A Report to Parliament

On The Readiness of First Nations Communities And Organizations To Comply With The Canadian Human Rights Act.

June 2011

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Executive Summary

Enacted in 1977, the *Canadian Human Rights Act* (*CHRA*) aims to ensure equality of opportunity and freedom from discrimination in federal jurisdiction. At the time that the *CHRA* was passed, however, it was understood that adjustments would have to be made before the federal government and First Nations operating under the *Indian Act* could be fully compliant with the new law. As a result, section 67 of the *CHRA* explicitly shielded the federal government and First Nations community governments from complaints of discrimination relating to actions arising from or pursuant to the *Indian Act*. This was intended to be a temporary measure, but the "*Indian Act* exception" remained in effect until the passage on June 18, 2008 of Bill C-21, *An Act to Amend the Canadian Human Rights Act*.

Prior to the passage of Bill C-21, First Nations leaders were clear that their communities and organizations required time to adjust to the full application of the *CHRA*, and to prepare for possible complaints against them. Although the *CHRA* applied fully to the federal government immediately, a grace period of 36 months was allowed in the legislation to give First Nations additional time to prepare. This grace period expires in June 2011.

Bill C-21 also required the "Government of Canada, together with the appropriate organizations representing the First Nations peoples of Canada" to "undertake a study to identify the extent of preparation, capacity and fiscal and human resources that will be required in order for First Nations communities and organizations to comply with the *Canadian Human Rights Act*." In keeping with this statutory requirement, the Department of Indian Affairs and Northern Development (DIAND), on behalf of the Government of Canada, asked three organizations that represent the interests of those constituencies most affected by the repeal of section 67 of the *CHRA* to conduct an assessment of the readiness of their respective constituencies to implement the *CHRA*. These three organizations are the Assembly of First Nations (AFN), the Native Women's Association of Canada (NWAC) and the Congress of Aboriginal Peoples (CAP). This report summarizes the results of this work, lays out the progress made by First Nations communities and organizations in preparing for the full application of the *CHRA*, and fulfills the Government of Canada's requirement under section 4 of the *Act*.

These organizations are well placed to identify the current state of preparedness for the implementation of Bill C-21. However, the perspectives and conclusions presented in their respective reports are entirely their own. Neither DIAND nor any other department or agency of the federal government has verified the data used or the conclusions made therefrom, and their respective reports are presented in the Annex to this document

unchanged from how they were received by DIAND. The complete report of each organization is available directly from either the AFN, NWAC or CAP.

Each organization approached its work from a slightly different perspective. However, they all conclude that, based on their research and analysis, First Nations communities and organizations are not yet adequately prepared for the full application of the CHRA. They point to needs in three general areas. First, all three reports noted that there is generally a low level of awareness of both the *CHRA* itself, of the rights that are protected by it, of the Canadian Human Rights Commission and the complaints process, and of the repeal of section 67 and its possible effects on First Nations people, communities and organizations. Second, the reports noted the insufficient capacity of some First Nations communities and organizations to prepare for the full application of the *CHRA*. This includes the resources and capacity to review laws and procedures; training and tools to evaluate accessibility of infrastructure; and First Nations based mechanisms to resolve complaints. Third, the reports outline the need for financial and human resources to support both the building of awareness and capacity, as well as possible gaps in the accessibility of infrastructure on First Nations reserves.

The challenge of ensuring that government programs and services are delivered in a manner which fully respects and protects human rights is important, and not one that is unique to First Nations governments. The Government of Canada recognizes First Nations governments as possessing, like other governments in Canada, the powers and authorities necessary to prepare First Nations communities and organizations for the full application of the *CHRA*. Over time, as complaints arise that highlight possible breaches of the *CHRA*, First Nations governments will be able to further adjust their practices to respond to complaints, and to prevent them from arising again in the future. Programs and services are available through a number of federal departments and agencies to assist First Nations communities and organizations with these adjustments, and the Canadian Human Rights Commission is working to raise awareness of the *CHRA* within First Nations communities, strengthen its relationship with First Nations governments, and to provide the information they require as they prepare for their new responsibilities.

Chapter 1: Introduction

The *Canadian Human Rights Act (CHRA)*, enacted in 1977, prohibits discriminatory practices on the basis of a list of enumerated grounds in areas of employment, accommodation and the provision of goods, services or facilities that are customarily available to the public. The *CHRA* applies to federal legislation, federal government departments, agencies and Crown corporations, and federally regulated businesses and industries such as banking and communications.

There was one major area, however, surrounding which complaints could not be made: Section 67 of the *CHRA* explicitly shielded the federal government and First Nations community governments from complaints of discrimination relating to actions arising from or decisions made pursuant to the *Indian Act*.

At the time that the original *CHRA* was passed in 1977, section 67 was included as a temporary legislative provision to allow time for amendments to provisions of the *Indian Act* that were acknowledged to likely become the subject of *CHRA* complaints against First Nations and the federal government operating under the *Indian Act*. Despite numerous attempts to repeal section 67, it remained in effect until the June 18, 2008 passage of Bill C-21, *An Act to Amend the Canadian Human Rights Act*.

That Act ("Bill C-21") repealed section 67 of the *CHRA* with immediate application to the Government of Canada and a three-year-delayed application to First Nations governments operating under the *Indian Act*. Section 3 of Bill C-21 states:

> *... an act or omission by any First Nation government, including a band council, tribal council or governing authority operating or administering programs or services under the Indian Act, that was made in the exercise of powers or the performance of duties and functions conferred or imposed by or under that Act shall not constitute the basis for a complaint under Part III of the* Canadian Human Rights Act *if it occurs within 36 months after the day on which this Act receives royal assent.*

In anticipation of the passage of Bill C-21 in 2008, First Nations leaders expressed that they required time to prepare for compliance with the *CHRA* as it relates to actions and decisions made pursuant to the *Indian Act*. The 36-month delay, which expires on June 18, 2011, was intended to provide First Nations governments with the *CHRA* compliance preparation time that was sought.

The Mandate, Purpose and Objective of the Report

Bill C-21 required the Government of Canada, during the 36 month delay period, to conduct a study and report on the readiness of and resources required by First Nations communities and organizations to respond to the repeal of section 67. Section 4 of Bill C-21 states:

> *4. The Government of Canada, together with the appropriate organizations representing the First Nations peoples of Canada, shall, within the period referred to in section 3, undertake a study to identify the extent of preparation, capacity and fiscal and human resources that will be required in order for First Nations communities and organizations to comply with the Canadian Human Rights Act. The Government of Canada shall report to both Houses of Parliament on the findings of that study before the expiration of the period referred to in section 3.*

This report ("Report") includes the studies undertaken, and summarizes the preparedness of First Nations communities' and organizations' for the full application of the *CHRA*.

How This Report Was Prepared

In keeping with the statutory requirements under section 4 of Bill C-21, the Department of Indian Affairs and Northern Development (DIAND), on behalf of the Government of Canada, provided funding during the fiscal year of 2009-2010 to three organizations that represent the interests of those constituencies most affected by the repeal of section 67 of the *CHRA*: the Assembly of First Nations (AFN), the Native Women's Association of Canada (NWAC), and the Congress of Aboriginal Peoples (CAP).[1]

Each organization was asked to conduct a needs assessment study with its respective constituency on the readiness of First Nations governments to implement the *CHRA*. The needs assessment was to involve a consideration of the impact of *CHRA* claims on the constituency, as well as a consultation with its members regarding their views on what needs to be done to prepare for the implementation of the repeal of section 67 of the *CHRA*. These needs assessment reports were then submitted to DIAND in March and April 2010. These reports have been published by each of the organizations.

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[1] Profiles of each of these organizations can be found in the Annex to this report, and in the individual submissions from each organization.

In 2010-2011, the three organizations developed summaries of their respective needs assessment reports for inclusion in this Report to Parliament. These summaries are included in the Annex to this Report.

While these organizations, who represent much of the population affected by the repeal of section 67 of the *CHRA*, are in many ways well placed to identify the current state of preparedness for the implementation of Bill C-21, the perspectives of and conclusions drawn by these organizations in their respective needs assessments are entirely their own. Neither DIAND nor any other department or agency of the federal government has verified the data used or the conclusions made therefrom in their respective reports. It should be noted as well that the submission of each of the organizations is presented here largely as it was received by DIAND, with formatting and editing changes made only for the purpose of integrating the document into this Report. As already noted, the complete needs assessment report of each organization is available directly from that organization.

Federal Departments and Agencies

In addition to the collaboration with Aboriginal organizations, DIAND worked with other federal departments and agencies to gather information for this Report on existing federal initiatives that support community readiness for the implementation of the *CHRA*.

Based on the needs identified in the needs assessment reports, a list of the federal departments that could most clearly and directly support First Nations communities in preparing for the full application of the *CHRA* was identified and included the Department of Indian and Northern Affairs Canada, Labour Canada, the Department of Human Resources and Skills Development Canada, Canada Mortgage and Housing Corporation, and Public Works and Government Services Canada. A short profile of federal programs and services that are available to First Nations communities and organizations to address some of the needs expressed in these reports was compiled, and is included in Chapter 3 of this Report. It should be noted that the information provided herein is not necessarily a comprehensive list, has not been validated by all of the relevant federal departments, and should not be seen as forming part of the needs assessment.

The Canadian Human Rights Commission

The Canadian Human Rights Commission (CHRC) is responsible for the ongoing management and implementation of the *CHRA* through both its complaint management process, and its public education and awareness mandates. Given its mandate and specialized expertise in the application of the *CHRA*, the CHRC could be considered as

having the primary responsibility for addressing the capacity requirements of First Nations communities and organizations.

In fact, the CHRC's National Aboriginal Initiative[2] is the lead in the overall implementation and operational management of the amendments to the *CHRA* brought by Bill C-21, including the implementation of new resources for:

- the development of culturally appropriate training materials for First Nations;
- sponsoring community-based pilot projects to develop internal conflict resolution processes;
- the development of best practices tool-kits for use by First Nations governments; and
- the development of guidelines on balancing collective and individual rights for Tribunal members and Commissioners in the review and adjudication of complaints as per the statutory requirement set out in section 1.2 of Bill C-21. [3]

A collaborative process was established that sought to bring the three Aboriginal organizations and federal government partners together for the purpose of preparing the Report to Parliament. However, over the course of the drafting, the CHRC notified DIAND that it would not be participating in this Report and would be tabling its own separate report to Parliament.[4] As a result, Chapter 3 of this report focuses on the departments and agencies involved in aspects of the issues raised in the three needs assessment reports, but provides only a general overview of the role played by the CHRC, referring the reader to the CHRC's own Report.

Before a full consideration of the preparation, capacity, and fiscal and human resources required by First Nations communities and organizations to comply with the *CHRA* is possible, a brief presentation of the anticipated impact of the repeal of section 67 is necessary. This is offered in the next chapter of the Report.

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2 For more information, see the Canadian Human Rights Commission's National Aboriginal Initiative's website at www.chrc-ccdp.ca/nai_ina/default-eng.aspx.

3 Canadian Human Rights Commission, *2010 Annual Report*, online: Canadian Human Rights Commission, <http://www.chrc-ccdp.ca/publications/ar_2010_ra/toc_10_tdm-eng.aspx>.

4 The Report of the CHRC will also be tabled in Parliament prior to June 18, 2011.

Chapter 2: An Amended *Canadian Human Rights Act*

Canada is considered by many around the world to be a leader in the recognition and protection of human rights. Beginning with the signing of the Universal Declaration of Human Rights in 1948, Canadian governments at all levels have worked to ensure that human rights protections are a fundamental part of Canadian legal discourse. As a result, there are now provincial human rights laws, the *Canadian Charter of Rights and Freedoms* ("Charter") as part of the Canadian Constitution, and the *Canadian Human Rights Act* and the two bodies it created: the Canadian Human Rights Tribunal (CHRT), and the Canadian Human Rights Commission (CHRC).

Enacted in 1977, the *Canadian Human Rights Act (CHRA)* prohibits discriminatory practices based on an extensive list of grounds in areas of employment, accommodation and the provision of goods, services or facilities that are customarily available to the public. The *CHRA* applies to federal government departments, agencies and Crown corporations, as well as to federally regulated businesses and industries, such as the banking and communications sectors.

The *CHRA* prohibits any employer or provider of a service that falls within federal jurisdiction to discriminate based on eleven grounds. These grounds[5] are:

- Race
- National or ethnic origin
- Colour
- Religion
- Age
- Sex (including pregnancy and childbearing)
- Sexual Orientation
- Marital status
- Family status
- Physical or mental disability (including dependence on alcohol or drugs)
- Pardoned criminal conviction.

Individuals or groups who believe that they have experienced discrimination in employment and the provision of services within federal jurisdiction on any of these grounds may submit a formal complaint to the Canadian Human Rights Commission for investigation. The CHRC is an autonomous administrative body created with the

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[5] See the Canadian Human Rights Commission's website at http://www.chrc-ccdp.ca/discrimination/grounds-eng.aspx for the complete list.

passage of the *CHRA* in 1977, operating in the public interest, at arms-length from the government, with a formal mandate to protect and promote the equality rights of Canadians. The CHRC administers the *CHRA* including evaluating and investigating complaints, providing conciliation services for the settlement of valid complaints, and where warranted, referring complaints to the Canadian Human Rights Tribunal (CHRT). The CHRT is the quasi-judicial body that is separate from and independent of the CHRC, and its decisions may be enforced by the Federal Court. The CHRT adjudicates on matters referred to it, and possesses broad remedial powers to address complaints.

In addition to its role in administering the complaints process, the CHRC also conducts research and undertakes projects to inform members of the general public about their rights under the *CHRA*. It also monitors federal programs, policies and legislation that might impact upon the equality rights of vulnerable groups in Canadian society. The CHRC also works with federally regulated organizations to prevent discriminatory conduct within their environments.

History of Attempts to Repeal Section 67 of the CHRA

Section 67 of the *CHRA* effectively shielded the federal and First Nations governments from complaint against any decision or action authorized by the *Indian Act*:

> *Nothing in this Act affects any provision of the* Indian Act *or any provision made under or pursuant to that Act.*

Section 67 mostly affected those individuals registered or entitled to be registered as "Indians" under the *Indian Act*. It prevented the application of the *CHRA* to any *Indian Act*-related action or decision including Indian registration, the allocation of land on reserve, and band elections.[6]

Since its inclusion in the *CHRA* in 1977, it was the intention of the Government of Canada to eventually repeal section 67, to ensure that all Canadians had access to the same protection of human rights. As noted above, section 67 was intended to be a temporary provision in the *CHRA* at the time it was passed in 1977, to allow time for amendments to provisions of the *Indian Act* that were acknowledged to likely become the subject of CHRA complaints against First Nations and the federal government operating under the *Indian Act*.

The first attempt to repeal section 67 was in December of 1992, however, Parliament was dissolved before the amendments could be passed. Similarly, a second attempt at repeal was made in 2002, but was unsuccessful when Parliament was prorogued in

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6 The *Indian Act* does not apply to the Inuit and Métis, so they are not similarly affected.

2003. The third and fourth attempts, respectively in October 2005 and December 2006, were similarly unsuccessful. Finally, Bill C-21, which came into force on June 18, 2008 as *An Act to amend the Canadian Human Rights Act*, S.C. 2008, c. 30, resulted in the repeal of section 67 of the *CHRA* with immediate application to the federal government and a 36 month delay of application to First Nations governments. This delay expires on June 18, 2011.[7]

The Impact of the Repeal of Section 67

Despite the shield provided by section 67, it must be stated that the actions of many First Nations government have always been subject to the *CHRA*, as many actions (or omissions) are made pursuant to some other authority, and not to the *Indian Act*. Prior to the repeal of section 67, the CHRC dealt with approximately 40 complaints involving First Nations governments per year. Examples of decision-making areas that were always subject to the *CHRA*, and are unchanged by the repeal of section 67, include:

- Decisions of Band Councils and administrators surrounding human resources, such as hiring and dismissal.

- Decisions of Band Councils and administrators relating to infrastructure such as accommodating persons with disabilities.

- Laws, codes, policies passed by Band Councils and enacted outside of the *Indian Act* such as First Nations laws passed pursuant to the *First Nations Land Management Act*.

- The decisions of First Nations governments that are not operating under the *Indian Act*, i.e., self-governing First Nations. Since there is limited application of the *Indian Act* to First Nations that have successfully negotiated self-governing agreements. Consequently, the repeal of section 67 of the *CHRA* will not have a significant effect on them. In negotiating these agreements, band members' human rights must be protected and as such, the agreements contain provisions to ensure that the *CHRA* and the Charter will prevail in the event of a conflict with the laws of the self-governing First Nation.

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[7] For an overview of the history of attempts to repeal section 67, see Mary C. Hurley, "*Bill C-44: An Act to amend the Canadian Human Rights Act*" Library of Parliament, (16 January 2007), online: Parliament of Canada <www2.parl.gc.ca/legisinfo/index.asp?Language=E&query=4900&Session=14&List=ls#aoverview>

It should also be stated that the repeal of section 67 does not change the operation of the *Indian Act*; the provisions of the *Indian Act* continue to apply to those who are registered or entitled to be registered as Indians, members of bands, Chiefs and Band Councils, and the federal government.

As of June 19, 2011, decisions of a First Nation government may become the subject of a *CHRA* complaint, including decisions relating to:

- Band Council elections under the *Indian Act*;
- by-laws passed and enacted pursuant to sections 81 (By-law making powers), 83 (Money by-laws), and 85.1 (Intoxicants) of the *Indian Act*;
- management of moneys held in trust for bands; and
- land management decisions.

Actions or omissions made under or pursuant to the *Indian Act* that may be subject to a complaint must, however, fit within the *CHRA*'s area of application, that is, employment and the provision of goods, services, facilities or accommodation customarily available to the general public. Consequently, it is only to the extent that these are deemed to be a service, the provision of facilities or accommodation or employment that operations under the *Indian Act* may be subject to a complaint made under the *CHRA*.

It should be noted, however, that a complainant may be required by the CHRC to pursue other available recourses before the processes and remedies made available under the *CHRA* can be accessed. Similarly, a decision made by DIAND may be considered to fall outside of the jurisdiction of the CHRC because it is not the provision of a good or a service or an employment issue. Nevertheless, the repeal of section 67 means that the human rights of First Nations people will be protected by the *CHRA* in the same way as those of other Canadians, for the first time since the *CHRA* was enacted almost 35 years ago.

Implementing Bill C-21

Implementing the changes made as a result of the repeal of section 67 will involve the participation of a number of stakeholders. Three main groups have been identified as being most affected by the repeal:

- Registered Indians (residing either on or off-reserve)[8]
- Members of a band (residing either on or off-reserve)[9]
- Residents on-reserve (both registered Indians and non-status Indians, Métis, Inuit, and non-Aboriginal people living on reserve).[10]

Preparing for the application of the *CHRA* affects all First Nations governments who operate under the authority of the *Indian Act*. However, the stakeholders listed above are also represented nationally by three main organizations: The Assembly of First Nations (AFN), the Native Women's Association of Canada (NWAC), and the Congress of Aboriginal Peoples (CAP). Each of these organizations participated in the development of this report, and their views on the needs of their respective constituencies and memberships in preparing for the implementation of Bill C-21 are presented in the Annex.

Similarly, there will be an important role for the federal government to play in the implementation of Bill C-21. Many programs and services available to First Nations communities and organizations to assist them in preventing and responding to complaints made pursuant to the *CHRA* are summarized in Chapter 3. However, perhaps the greatest role in the early stages of the implementation of Bill C-21 will be played by the CHRC.

In keeping with its mandate, the CHRC established the National Aboriginal Initiative, to work with "First Nations and other Aboriginal stakeholders to prepare for the full implementation of the repeal of section 67 of *the Canadian Human Rights Act*."[11] In keeping with this role, the CHRC has made available new resources for:

- the development of culturally appropriate training materials for First Nations;
- the funding of community-based pilot projects to develop internal conflict resolution processes;
- the development of best practices tool-kits for the use of First Nations governments; and

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[8] This represents more than 800,000 people, 427,554 of whom reside on-reserve, 357,518 of whom reside off-reserve, and 24,234 of whom reside on crown land. From Indian and Northern Affairs Canada, *Registered Indian Population by Sex and Residence*, 2009, page ix.

[9] There are approximately 620,340 people who are members of a band, residing either on or off a reserve. From Statistics Canada, *Aboriginal Peoples of Canada: 2006 Census*.

[10] With respect to the non-Aboriginal population living on reserve, the 2006 Census data shows this to be estimated at 31,045. Ibid.

[11] See the Canadian Human Rights Commission, *Annual Report 2010*. More information on the National Aboriginal Initiative can be found on the Commission website at www.chrc-ccdp.ca.

- the development of guidelines on balancing collective and individual rights for Tribunal members and Commissioners in the review and adjudication of complaints as per the statutory requirement set our in section 1.2 of Bill C-21.[12]

The specific activities undertaken by the CHRC since the passage of Bill C-21 in supporting First Nations communities and organizations can be found in their Annual Report to Parliament.

12 Ibid.

Chapter 3: The Findings of the Needs Assessment Reports

Assessing the overall state of readiness of more than six hundred First Nations communities is not a simple task. First Nations communities across Canada range in size, population and location and, as a result, are at different stages of preparedness to implement Bill C-21. Their understanding of the *CHRA* and the CHRC varies greatly: some communities are familiar with the *Act* and the processes it establishes and, as a result, may be better equipped to ensure that their decisions and policies are *CHRA* compliant. Some may have established community-based alternative dispute resolution mechanisms. Other communities, however, may have had no experience with the *CHRA,* or the CHRC, and may be unfamiliar with ensuring *CHRA* compliance.

An analysis of the needs assessment reports submitted by the AFN, NWAC and CAP, confirms these differing levels of preparedness for *CHRA* implementation. Only general conclusions can be made as a result of this study and care will need to be exercised to ensure that the specific circumstances facing individual First Nations communities and organizations are considered.

Furthermore, there remains considerable room for differences of opinion regarding not only the extent of any gaps in preparation, but in the roles and responsibilities of various stakeholders in responding to these gaps. The perspectives expressed by these organizations in their respective needs assessments are entirely their own. Neither DIAND, nor any other department or agency of the federal government has verified this data or the conclusions made therefrom in their respective reports.

How Prepared Are First Nations?

It is the conclusion of the reports of the three Aboriginal organizations that, while a great deal of work has been carried out in this period to prepare for the full application of the *CHRA*, that First Nations communities and organizations have not, in the three year delay of application period, become fully compliant. An analysis of the three studies reveals some common issues:

1. A general lack of awareness of the *CHRA* ;
2. Insufficient capacity of First Nations communities and organizations to prepare for the full application of the *CHRA*; and
3. Insufficient financial and human resources required to address these issues and prevent the full range of possible complaints.

Awareness Among First Nation Individuals, Communities and Organizations

The studies of the three Aboriginal organizations conclude that there is generally a low level of awareness of both the *CHRA*, of the rights it seeks to protect, of the CHRC and its complaints process, and of the repeal of section 67 and its possible effects for First Nations people, communities and organizations. The AFN, for example, noted that greater communication is required at two levels: first, at the level of Chief and Council and their staff and, second, at the level of community members to ensure they are aware of their rights. Similarly, a lack of awareness of the *CHRA*, the effect of the repeal of section 67, and of what the customary laws are of their own First Nation, were reported both by NWAC and by CAP from their community dialogue sessions and focus groups. If it is assumed that one needs to be aware of legislative change before one can fully prepare for it, these findings from the three reports alone would suggest that First Nations communities are not yet adequately prepared.

Given its mandate to administer the *CHRA* and to "foster understanding and commitment to achieving a society where human rights are respected in everyday practices", a significant role must be played by the CHRC in addressing these gaps in awareness among First Nations communities and organizations. As reported in its 2010-2011 Annual Report, the CHRC has undertaken a number of initiatives that respond to this need. It established the National Aboriginal Initiative, the objective of which is to:

> *"... strengthen relations with Aboriginal groups and foster a dialogue on how to incorporate the unique context of First Nations communities into human rights protection mechanisms. Its focus is on making the Commission's programs more accessible and culturally sensitive to First Nations people and communities, and on supporting First Nations human rights."*[13]

Since its inception, the CHRC's National Aboriginal Initiative has sought to address weakness in awareness of the *CHRA* and the CHRC, and the possible effects of the repeal, by strengthening the CHRC's relationship with First Nations communities and providing information to First Nations governments.[14] The Commission also "collaborated with the NWAC to develop educational material to improve people's understanding of their rights."[15]

It will take time and effort for these activities to translate into demonstrable improvements in the level of awareness of First Nations individuals, communities and

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13 Canadian Human Rights Commission, *2010 Annual Report*, online: Canadian Human Rights Commission, <http://www.chrc-ccdp.ca/publications/ar_2010_ra/toc_10_tdm-eng.aspx>

14 Ibid.

15 Ibid.

organizations. The findings of the three needs assessment studies suggest that the recent work of the CHRC has been insufficient. How further work in this area can be supported or expanded in the years ahead needs to be determined.

Capacity of First Nations Communities and Organizations

A second major area where the needs assessment studies of the three Aboriginal organizations identified gaps in readiness is a broad one: the capacity of First Nations communities and organizations to prepare for the full application of the *CHRA*. The studies identify a number of specific areas in which the capacity of First Nations communities and organizations are under-developed, which will hinder their ability to fully comply with the *CHRA*. More specifically:

- **Resources and Capacity to Review Laws and Procedures** – all three reports note insufficient resources and capacity in most First Nations communities to adequately support the legal review of their own laws to ensure they are complaint with the *CHRA*.

- **Training** – the reports expressed concerns regarding the lack of adequate training for First Nations government staff to prepare them for the full application of the *CHRA*. The AFN, for example, claims that as many as 6,387 people will need training of some sort if First Nations communities are to be *CHRA* compliant. They also offer suggestions as to the best means for providing this training.

- **Tools to Evaluate Infrastructure and Accessibility** – the AFN study notes that there is also not enough reliable information to effectively evaluate the degree to which infrastructure is accessible in First Nations communities.

- **First Nation-Based Mechanisms to Resolve Complaints** – the reports indicate a strong interest in ensuring that First Nation-based mechanisms for addressing and resolving complaints be developed to parallel or supplement those provided by the CHRC.

While these specific points relate to the capacity of First Nations communities and organizations, there is also the issue of the capacity of institutions such as the CHRT and the CHRC involved in the interpretation of the *CHRA* to understand and interpret First Nations customs and traditions. NWAC noted, in particular, the need for the CHRC to apply a gender-specific lens to the consideration of complaints in addition to cultural considerations mandated by the interpretive clause of the *CHRA* itself. It argues that tools and skills need to be developed within these institutions to effectively balance individual rights with collective rights in the Aboriginal context.

The Government of Canada has existing programs and services that may assist in building capacity in First Nations communities to respond to the specific needs outlined in the three studies. These include:

- Programs of the Department of Indian Affairs and Northern Development
  - Tribal Council Funding and Band Advisory Services
  - Band Support Funding
  - The Professional and Institutional Development Program
  - The National Centre for First Nations Governance
  - By-law Advisory Services Unit
  - Elections Unit
- Racism-Free Workplace Strategy (Labour Canada)
- Social Development Partnerships Program – Disability (Human Resources and Skills Development Canada – Office for Disability Issues)

There are also programs and services available through the Canadian Human Rights Commission (CHRC). Given its mandate to "foster understanding and commitment to achieving a society where human rights are respected in everyday practices", First Nations communities and organizations may contact the CHRC for further information on how their programs and services might assist them with ensuring CHRA compliance.

Department of Indian Affairs and Northern Development

In First Nations communities, governance capacity development and the implementation of government functions are assisted through, amongst other initiatives – DIAND programs, tools and mechanisms designed to support and enrich community governance and the administration of government.

Tribal Council Funding and Band Advisory Services

The *Tribal Council Funding* program provides funding to Tribal Councils to enable them to retain employees to provide advisory services and deliver programs and services to their First Nations members. The objective of the program is to provide core funding to Tribal Councils, created and mandated by bands, for the aggregated delivery of advisory services and programs to affiliated bands.

The purpose the *Band Advisory Services Program* is to provide funding to First Nations not affiliated to Tribal Councils to assist them to independently access band advisory services. This program is available to larger First Nations with a minimum on-reserve population of 2,000 Status Indians. The objective of the *Band Advisory Services* program, which has been operating since 1989, is to provide funding to large,

unaffiliated bands to "make or buy" advisory services to support effective community governance.

In relation to the implementation of section 67 of the *Canadian Human Rights Act*, First Nations communities may provide a mandate to their Tribal Council to provide services to respond to several of the gaps identified in the needs assessment. Similarly, First Nations communities eligible for the *Band Advisory Services* program may seek expertise and services in one or more of these identified areas. The services provided or obtained through *Tribal Council Funding* or *Band Advisory Services* could include: a legal or gender-based review of First Nations government laws and policies, training for community staff regarding the CHRA, an evaluation of the state of accessibility of infrastructure in their community and training in alternative dispute resolution mechanisms. Each of these activities would be dependent on tribal council or band advisors having expertise in these areas.

Band Support Funding

The *Band Support Funding* program assists First Nations to meet the costs of local government and the administration of departmentally funded services. This support is intended to provide a stable funding base to facilitate effective community governance and the efficient delivery of services.

Overall, the grant funding is designed to provide, in comparison with other local jurisdictions of comparable size, a reasonable contribution to the costs of governance, with a specific focus on the costs associated with the administration of departmentally funded programs and services.

As a grant, *Band Support Funding* is the most flexible funding provided to First Nations communities by DIAND. Communities may decide to use this funding to assist in responding to the repeal of s. 67 of the *Canadian Human Rights Act*. Furthermore, communities may decide to use a portion of the grant to increase their readiness with regard to the implementation by funding: legal and gender-based reviews of policies and codes, developing Alternative Dispute Resolution mechanisms, training community staff members, and performing an evaluation of infrastructure.

Tribal and Band Advisory Services and *Band Support Funding* represent existing programs with a previously approved amount of funding. As there is a maximum amount directed towards each Tribal Council and First Nations community, S.67 related activities would only be funded at the expense of existing funding pressures.

Professional and Institutional Development Program

The Professional and Institutional Development Program (P&ID) is a proposal-based program used to develop the capacity of First Nations to perform core functions of government, by funding governance-related projects at the community and institutional levels. Each Region of the Department of Indian Affairs and Northern Development has an independent budget for the Professional and Institutional Development Program, for use in funding projects that will benefit the governance capacity of First Nations in that Region.

In order to be eligible for funding, proposals must benefit the governance capacity of First Nations and/or Tribal councils. First Nations communities may submit proposals for project funding to develop their governance capacity if it addresses one of the ten core functions of governance outlined by P&ID. Those ten core functions of governance are: Leadership, Membership, Law-Making, Community Involvement, External Relations, Planning and Risk Management, Financial Management, Human Resources Management, Information Management / Information Technology, and Basic Administration. Meeting one of these core functions, First Nations communities and organizations may access project funding in a manner that is related to the implementation of the repeal of s. 67 of the *Canadian Human Rights Act,* to conduct a legal review of First Nations government laws and policies or in order to train community employees regarding the CHRA. The program could also fund projects to develop Redress or Dispute Resolution codes, which disabled members could use to resolve complaints locally rather than following the Canadian Human Rights Commission complaints resolution or tribunal process.

Distribution of available project funding is dependent on the value of proposals submitted to a Region in a given year, and on the funding priorities of the year in which the proposal is received.

National Centre for First Nations Governance

The *National Centre for First Nations Governance* (NCFNG) is a service and research organization for First Nations. The centre's mandate is to support First Nations as they develop effective, independent governance by providing relevant and innovative knowledge and development of governance services, product and events. *NCFNG*'s two-pronged mandate supports First Nations as they seek to implement effective self-governance while also assisting First Nations in the further development of their day-to-day government operations. The Centre also supports First Nations in their efforts to develop their jurisdictional authorities.

The *NCFNG* is a non-profit organization. It is governed by First Nations professionals and operates independently from the Government of Canada and political organizations. However, the Government of Canada provides funds to the Centre to enable them to carry out their mandate. Funding to the *NCFNG* varies year-to-year based on the availability of funds and the work plan provided by the *NCFNG*.

First Nations can contact the NCFNG in order to discuss the possibility of working on their governance needs as related to the implementation of the repeal of s. 67 of the *CHRA*. These proposed services may include providing a legal and gender-based review of First Nations government laws and policies and providing training for employees regarding the *CHRA*.

By-law Advisory Services Unit

The *Indian Act* provides for the enactment of by-laws by Band Councils pursuant to section 81 (local government by-law making powers), section 83 (money by-laws) and section 85.1 (prohibition of intoxicants) of the *Indian Act*. The By-laws Advisory Services Unit was introduced in 1989 to assist Band Councils to develop and enact by-laws enacted pursuant to sections 81 and 85.1 of the *Indian Act*, as this process can sometimes be difficult and confusing. It should be noted that pursuant to section 83 of the *Indian Act* First Nations have the ability to enact taxation and resource generating by-laws, however contrary to by-laws enacted under sections 81 and 85.1 of the *Indian Act*, section 83 by-laws are processed by the First Nations Tax Commission.

Band Councils enact by-laws under sections 81 and 85.1 of the *Indian Act* must forward them to DIAND, in accordance with the requirements of the *Indian Act*, to By-law advisors who then review and assess the draft or enacted by-law against legislative requirements, the *Charter* as well as other relevant legislation.

The objective of the By-law Advisory Services Unit is to:

- provide technical assistance to Band Councils in developing, enacting and implementing by-laws enacted pursuant to sections 81 and 85.1 of the *Indian Act;*
- monitor by-law development with a view to ensuring that the Department's statutory and legal obligations are met by providing timely advice to the Minister on the use of disallowance powers;
- provide a by-law advisory, facilitation, and training service for the benefit of Band Councils, Aboriginal organizations and enforcement agencies; and
- support governance and control over local matters by supporting the use of by-law making powers as provided for in sections 81 and 85.1 of the *Indian Act*.

With respect to the development and enactment of by-laws pursuant to sections 81 and 85.1 of the *Indian Act*, the By-law Advisory Services Unit, provides technical and drafting support to First Nations. During this process First Nations may consult the By-law Advisory Services Unit and have their by-laws reviewed prior to enactment. This initial review before enactment allows the By-law Advisory Services Unit to identify issues of concern such as potential Charter violations, conflicts, and operational/enforceability issues that may lead the Minister to disallow the by-law if not addressed. However, this can only be done in the instances where by-laws are submitted in draft form. In instances where by-laws are submitted after their enactment, the by-law is reviewed by the By-law Advisory Services Unit, however if issues of concern such as potential Charter violations, conflicts, and operational/enforceability issues are revealed, then the by-law may be disallowed by the Minister. The reviews conducted with respect to Charter compliance could easily be modified to include reviews for compliance with the *CHRA*.

In order to facilitate the development and enactment of by-laws by Band Councils, By-law workshops and training are offered to a variety of participants including: DIAND staff, First Nations leadership, First Nations organizations, law enforcement agencies, as well as other members of the public. The workshops address technical issues of drafting, enacting and enforcing by-laws. Resource materials include the workshop manual and sample by-laws. Approximately three to five by-law workshops are provided within any given fiscal year. The provision of training is contingent upon operational and DIAND priorities, funding, regional needs and allocated on a "first come first serve" basis. By-law advisors also meet with Council, community members, and enforcement and prosecution agencies in an effort to assist in resolving implementation and enforcement issues. As DIAND representatives from the By-law Advisory Services Unit have the expertise required to deliver the service, no direct funding is provided to First Nations communities.

Elections Unit

DIAND oversees the implementation and administration of governance processes under the *Indian Act*, including elections conducted in accordance with the electoral provisions of the *Indian Act* and Indian Band Election Regulations. This includes any appeals that may ensue; the administration of the Indian Band Council Procedure Regulations; as well as reviewing these processes to respond to new challenges and court decisions such as the *Corbière* and *Esquega* decisions. The Elections Unit of DIAND administers the *Indian Act* and all relevant federal regulations in the areas of elections and council procedures. DIAND also develops and delivers training programs, as well as prepares forms and manuals related to the *Indian Act* election process. Headquarters is also responsible for the reception, and management processes related to *Indian Act* election appeals and for providing recommendations.

The majority (approximately 340 of the 616) First Nations communities conduct their elections according to their own community system. This means that they have their own set of rules and procedures governing their leadership selection and are thus not subject to the election provisions of the *Indian Act* and its accompanying regulations. Furthermore, they are not required to follow the Indian Band Council Procedure Regulations in the conduct of band council proceedings.

When a First Nation community wishes to be removed from the electoral provisions of the *Indian Act*, they may develop their own custom code that must meet certain requirements. DIAND will assist the community in drafting a sound election code. The First Nation community may wish to avail itself of the sample custom leadership selection code developed by DIAND to use as a guide in drafting its own code.

Approximately three to five electoral officer and electoral code workshops occur within any given fiscal year. The provision of training is contingent upon operational and DIAND priorities, funding, regional needs and allocated on a "first come first serve" basis. Training or workshops regarding election code development draw explicit attention to the requirement that submissions must be Charter compliant. Materials will be reviewed in order to ensure that *CHRA* requirements are also identified and brought to participants' attention. While services and expertise are provided by DIAND, First Nations may access departmental funding to assist with items such as the costs associated with developing a code, community consultations and a ratification vote.

In the case of the development of election codes, the Election Unit, of the Band Governance Directorate, all proposed codes submitted by First Nations wishing to be removed from the application of the election provisions of the *Indian Act* must, among other things, be Charter compliant.

The Elections Unit supports the implementation of the *CHRA* through ensuring that the correct procedures and policies related to the elections process are followed. In addition, the unit support the development of custom codes that are both Charter and *CHRA* compliant, to enable that the selection process can take place outside of the *Indian Act*.

Labour Canada

Racism-Free Workplace Strategy

Labour Canada provides resources to foster an understanding of the components of an inclusive workplace. These resources are delivered through the Government of Canada's Racism-Free Workplace Strategy which is a key component of *A Canada for All: Canada's Action Plan Against Racism*. The Strategy complements and increases the effectiveness of the Employment Equity Act by focusing on workplaces under the

jurisdiction of the Employment Equity Act to eliminate employer-related systemic policies and practices that inhibit the recruitment, retention and advancement of members of Visible Minorities and Aboriginal peoples.

The Labour Program provides assistance and tools to help build inclusive and racism-free workplaces. RFWS officials across Canada work with employers, unions and community groups, providing:

- awareness sessions on creating more inclusive workplaces and on race-related issues;
- advice and support to address racism-related issues in the workplace; and
- information on recruitment, advancement and retention best practices for Aboriginal people and members of visible minorities.

The RFWS partnered with the Aboriginal Human Resource Council (AHRC) to enhance the capabilities of federally-regulated employers covered under the *Employment Equity Act* to recruit, retain and advance Aboriginal peoples in the workplace. The work currently being delivered includes structured and well-developed tools, tip-sheets and resources, web-site portal, environmental scans, quarterly newsletters, web casts and in-house company training.

A key element of this partnership is the delivery of specialized workshops entitled RFWS' Mastering Aboriginal Inclusion. These one-day workshops are aimed at increasing awareness of barriers to employment, providing innovative solutions, and assisting employers in developing and fostering partnerships with Aboriginal communities and organizations.

Human Resources and Skills Development Canada

Social Development Partnership Program

Human Resources and Skill Development Canada's Office for Disability Issues administers the Disability component of *the Social Development Partnership Program (SDPP-D)*. This program provides funding, through grants and contributions, to projects that improve the participation and integration of people with disabilities in all aspects of Canadian society and to national disability organizations to: assist in building their capacity; increase their effectiveness; and encourage their viability as critical partners in furthering the disability agenda at the national level. Eligible recipients must be a not-for-profit organization and actively pursuing activities in line with the SDPP-D objectives.

SDPP-D provides three kinds of contribution funding to not-for-profit organizations: Social Development Projects, Accommodation Projects and Community Inclusion

Initiative. Each call for proposals has specific eligibility criteria, funding priorities and funding levels:

- *Social Development Projects:* Funds are provided to not-for-profit organizations for projects of national relevance or significance for people with disabilities that focus on the development and promotion of best practices and models of service delivery in Canada.

- *Accommodation Projects:* Funds support projects with the objective to enable people with disabilities to fully participate in key events and conferences by ensuring that the events are accessible. Eligible expenses could include accommodations such as: sign language interpretation, real-time captioning, readers and scribes, support persons and interveners.

- *Community Inclusion Initiative (CII):* The CII aims to promote the inclusion of people with intellectual disabilities in mainstream Canadian society by developing and implementing strategies to enable communities to become more inclusive of all members.

Financial and Human Resource Requirements

The third general category of needs identified in the studies of the three Aboriginal organizations relates to financial and human resources. Resources are required to support the awareness-building and capacity-building activities referenced in the studies. The AFN attempted to quantify some of the costs associated with the activities it believes need to be carried out. Resources were provided to the CHRC following the passage of Bill C-21 to undertake activities in these areas. Nevertheless, the three reports suggest that more resources will be required if First Nations are to ensure full *CHRA* compliance.

This Report does not claim to accurately quantify the specific requirements in terms of capacity, and the fiscal and human resources required to comply with the *CHRA*. It would be difficult to quantify the extent to which a community or organization is in compliance with human rights legislation with any accuracy because, being a complaints-driven process, it would require an ability to predict the numbers of complaints, the nature of the actions or omissions that led to the complaints, as well as a way to estimate the amount of awards and/or costs to remedy the action or omission in question. However, it is possible to estimate the financial and human resources necessary to address areas in which deficiencies can be more easily measured. Consequently, considerable attention is paid in the AFN report to community infrastructure, and on cost estimates associated with ensuring that infrastructure on First Nations reserves is *CHRA*-compliant.

Although it acknowledged that there is a critical lack of current data on the numbers of First Nations people on reserves living with physical disabilities and the cost of retrofitting public buildings,[16] the AFN developed a method for estimating the costs associated with making community infrastructure accessible to persons with disabilities. This estimate claims that as much as $54 million would be required over five years for First Nations-owned buildings to be made fully accessible to the public and to staff with disabilities, and another $332 million for the same to be made to First Nation-owned housing, over ten years.

The National Building Code of Canada (NBC) sets out technical provisions for the design and construction of new buildings. It also applies to the alteration, change of use and demolition of existing buildings. Any new construction, renovation, and/or retrofit activity both on and off-reserve must reflect the current National Building Code of Canada. As the NBC mandates accessibility for public buildings, construction of public buildings on reserve must meet these standards of accessibility. In addition, INAC stipulates in its funding agreements for the construction or renovation of buildings that the NBC must be followed. Therefore, all buildings constructed or renovated pursuant to these terms should be built in accordance with the standards set out in the NBC.

Older buildings, however, built in accordance with previous versions of the building code, may not meet these standards. Given that the Government of Canada does not currently track accessibility data, it is impossible to estimate the degree to which older infrastructure would require retrofits. As an initial step, DIAND is developing a revised Asset Condition Reporting System tool that will help to identify whether all public buildings meet NBC standards. It is anticipated that this tool will be in place for 2013, enabling the Department to provide analysis in 2014.

The Government of Canada provides programming through which First Nations communities and organizations may obtain funds to address accessibility issues. These programs include:

- On-reserve Residential Rehabilitation Assistance Program for Persons with Disabilities (CMHC)
- Home Adaptations for Seniors Independence Program *(CMHC)*
- Capital Facilities and Maintenance Program (DIAND)
- Enabling Accessibility Fund (HRSDC – Office for Disability Issues); and
- Public Works and Government Services

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[16] See the Assembly of First Nations, *Assessing First Nations Needs under the Canadian Human Rights* Act, in section 4 of this report.

Canada Mortgage and Housing Corporation

On-Reserve Residential Rehabilitation Assistance Program (RRAP) for Persons with Disabilities

The Canada Mortgage and Housing Corporation (CMHC) is Canada's national housing agency. It works with community organizations, private sector, non-profit agencies and all levels of government to help create innovative solutions to today's housing challenges, anticipate tomorrow's needs and improve the quality of life for all Canadians.

The CMHC *On-Reserve Residential Rehabilitation Assistance Program (RRAP)*, a component of which is RRAP for Persons with Disabilities (RRAP-D) was introduced in the early 1980's and is an on-going initiative. RRAP-D offers financial assistance to First Nations Councils and First Nations members to undertake accessibility work to modify dwellings occupied or intended for occupancy by low-income persons with disabilities.

An annual budget of $16.7 million is allocated to First Nations to fund a suite of renovation programs including RRAP. First Nations communities determine the priority of applications and therefore, determine the amount of budget committed for the RRAP for Persons with Disabilities Program.

Financial assistance is provided to undertake work intended to eliminate physical barriers and imminent life safety risks, and improve the ability to meet the demands of daily living within the home. Modifications must be related to the occupant's disability and must make the home accessible such as installing outdoor ramps for wheelchairs or walkers, non-slip surfaces, handrails, grab bars and adjustments to kitchens and bathrooms. The financial assistance is in the form of a forgivable loan. The maximum amounts for this assistance range from $16,000 to $24,000 depending on where the First Nation territory is located in Canada. Additional assistance is available for areas defined as remote.

Home Adaptations for Seniors Independence Program (HASI)

The Canada Mortgage and Housing Corporation offers the *Home Adaptations for Seniors Independence Program (HASI)* which helps homeowners and landlords pay for minor home adaptations to extend the time low-income seniors can live in their own homes independently. The adaptations should be minor items that meet the needs of seniors with an age-related disability. This could include handrails; lever handles on doors; walk-in showers with grab bars; or bathtub grab bars and seats.

Homeowners and landlords may qualify for assistance as long as the occupant of the dwelling where the adaptations is 65 and over; has difficulty with daily living activities

brought on by ageing; total household income is at or below a specified limit for the area; and the dwelling unit is a permanent residence.

Assistance is provided in the form of a forgivable loan of up to $3,500. The loan does not have to be repaid as long as the homeowner agrees to continue to occupy the unit for the loan forgiveness period, which is six months.

Department of Indian and Northern Affairs

Capital Facilities and Maintenance Program

The *Capital Facilities and Maintenance* Program managed by DIAND provides financial and technical support to First Nations for the planning, design, construction, acquisition, operation and maintenance of community infrastructure (such as roads, bridges, schools, community buildings, water and wastewater systems and electrification) on reserve. Funding is also provided for capacity building, including water and wastewater system operators training, fire protection awareness and community planning.

The *CFMP* provides financial and technical support to First Nations for the building and maintenance of community infrastructure. This could include design and construction of new facilities according to current building codes or major renovations to bring existing facilities into compliance with current building code standards; this could also include work to accommodate persons with disabilities. First Nations may allocate some of their Operation and Maintenance funding (received under the *CFM* Program) to address minor accessibility issues in community facilities.

Human Resources Development and Skills Canada

Enabling Accessibility Fund

The Office for Disability Issues is located within Human Resources Development and Skills Canada (HRSDC). Its mandate is to:

- foster coherent policies and programs in the federal jurisdiction and across all jurisdictions
- serve as a model for the federal government and provide leadership by example
- build the capacity of the voluntary sector and create cohesive networks of partners through strategic investment
- support the ongoing pursuit of knowledge to inform policy and program development; and

- reach out to Canadians to engage citizens on disability issues, increase awareness and create citizen consensus regarding full participation of people with disabilities in Canadian society.

The Office for Disability Issues administers *The Enabling Accessibility Fund (EAF)*. The EAF supports community-based projects across Canada that improve accessibility, remove barriers, and enable people with disabilities to participate in and contribute to their communities. Eligible recipients include not-for-profit organizations; small municipalities; small private-sector organizations; colleges and universities; territorial governments; and Aboriginal governments.

Through the Small Project Component of the EAF, grant funding of up to $100,000 is available to support activities that will improve the built environment through the renovation, construction and retrofitting of buildings, modification of vehicles for community use and to make information and communication technologies more accessible. All projects funded through this component must create or enhance accessibility for people with disabilities within Canada.

Through the Mid-sized Component of the EAF, contribution funding is provided for retrofits, renovations or new construction of facilities within Canada that house services and programs that emphasize a holistic approach to social and labour market integration needs of people with disabilities. The maximum amount payable per project is between $500,000 and $3 million.

Public Works and Government Services Canada

The Canadian Human Rights Act (CHRA) prohibits discrimination in the provision of goods, services, facilities and accommodation. It is the Government of Canada's policy to ensure barrier-free access to, and use of, real property it owns or leases. PWGSC's mandate is to be a common service agency for the Government of Canada's various departments, agencies and boards. On request, PWGSC provides technical support; architectural and engineering support services; and guidance on best practices as they apply to accessibility for persons with disabilities on an optional, cost-recoverable basis. Public Works and Government Services Canada is committed to making its facilities accessible to persons with disabilities.

For further information regarding these programs, please consult the respective departments or agencies directly.

Summary

The extent of preparation, capacity and fiscal and human resources that will be required in order for First Nations communities and organizations to comply with the *Canadian Human Rights Act* is what this Report seeks to address.

The needs assessment studies prepared by the three Aboriginal organizations conclude that there is a great deal of work yet to be done before First Nations communities and organizations can be said to be fully *CHRA*-compliant. They suggest that more work is required to increase awareness of the *CHRA* and the repeal of section 67 among not only First Nations leaders and organizations, but among communities and their members as well. They also note a number of specific areas in which the capacity of First Nations communities and organizations are under-developed, hindering their ability to fully comply with the *CHRA*. While the studies attempted to quantify the fiscal and human resources required for First Nations communities and organizations to be prepared, the data on which these estimates were based were acknowledged as being incomplete and out-of-date, particularly as it relates to infrastructure on reserve. Despite this, the studies propose that significant resources will be required, not only to address awareness and capacity challenges, but also possible impediments to reserve infrastructure being fully accessible.

The Government of Canada recognizes First Nations governments as possessing the powers and authorities necessary to prepare First Nations communities and organizations for the full application of the *CHRA*, just as it applies to other governments in Canada. Over time, as complaints arise that highlight possible breaches of the *CHRA*, First Nations governments will be able to further adjust their practices to remedy issues that are brought to light as a result of investigations by the CHRC and decisions by the CHRT, and to prevent further complaints, again, in the same way as other governments in Canada.

To assist First Nations communities and organizations in making these adjustments, a range of programs and services are available through a number of federal departments and agencies. In addition, the Canadian Human Rights Commission is working to raise awareness of the *CHRA* within First Nations communities, and strengthen its relationship with First Nations governments as they prepare for their new responsibilities.

Annex: The Reports of the Three National Aboriginal Organizations

Overview and Background

As discussed, three organizations were identified as representing the First Nations peoples of Canada affected by repeal of section 67 of the *Canadian Human Rights Act*. They are the Assembly of First Nations, the Native Women's Association of Canada, and the Congress of Aboriginal Peoples.

To respond to section 4 of Bill C-21, each organization was asked to undertake a study to,

> *"...identify the extent of preparation, capacity and fiscal and human resources that will be required in order for First Nations communities and organizations to comply with the Canadian Human Rights Act."*

This Annex of the Report provides a summary of the content of each organization's study. While these organizations represent much of the population affected by the repeal of section 67 of the *CHRA* and are well placed to identify the current state of preparedness for the implementation of Bill C-21, the perspectives of and conclusions drawn by these organizations in their respective reports are entirely their own. Neither DIAND nor any other department or agency of the federal government has verified the data used or the conclusions made therefrom in their respective reports. It should be noted as well that the submission of each of the organizations is presented here as it was received by DIAND, with formatting and editing changes made only for the purpose of integrating the document into this Report. As already noted, the complete needs assessment report of each organization is available directly from that organization.

Report of the Assembly of First Nations (AFN)

As noted in Chapter 2, it is expected that the repeal of section 67 will have the greatest impact on First Nations governments operating under the authority of the *Indian Act*. As of June 19, 2011, actions and decisions of Band Councils made under or pursuant to the *Indian Act* will be open to complaint under the *CHRA*. This means, for example, that matters relating to Band Council elections under the *Indian Act*, by-laws passed and enacted pursuant to sections 81, 83 and 85.1 of the *Indian Act*, the management of moneys held in trust for bands, and land management matters can now be subject to a complaint under the *CHRA*.

The Assembly of First Nations (AFN) is a national organization that represents the leadership of the people most impacted by these changes, more than 600 First Nations communities in Canada. The AFN's report, entitled *Assessing the Readiness of First Nations Communities for the Repeal of Section 67 of the* Canadian Human Rights Act," is the result of research and dialogue led by the AFN in all regions of Canada since the passing of Bill C-21.

Nine regional engagement sessions were held throughout Canada, with a total of 216 participants, ranging from Chiefs, Councillors, policy analysts, band administrators and employees, Tribal Council representatives and Elders. A "think-tank" session was also held, involving 20 policy analysts and technicians, and a panel discussion involving six lawyers at the AFN Policy and Planning Forum.

In addition to this participatory research work, the AFN also conducted a legal analysis and executed a case study analysis on the question of accessibility to infrastructure on-reserve for disabled persons.

The AFN also carried out a survey questionnaire encompassing all regions. Fifty-two of 209 surveys were completed, representing a 24.8% response rate, with the highest response coming from the Atlantic, Québec, British Columbia and Ontario regions. The response rate was not as strong as was hoped, so the AFN conducted a telephone survey to improve the sample size and bolster the data.

Report of the Native Women's Association of Canada (NWAC)

The Native Women's Association of Canada (NWAC) is generally viewed as the national voice representing Aboriginal women in Canada. Founded in 1974, NWAC brings together 13 Aboriginal women's groups from across Canada, which together share the common goals of preserving Aboriginal culture, achieving equal opportunity for Aboriginal women, and playing a role in shaping legislation relevant to Aboriginal women. NWAC is led by a President and Board of Directors, who cooperate and exchange information with local organizations. NWAC's Board of Directors works with the President and its provincial/territorial member associations to make local and national recommendations on Aboriginal programs and initiatives.

To prepare its report, the NWAC held five focus groups, one in each of the Sagamok and Eskasoni First Nations, in Halifax, Summerside (PEI) and Winnipeg. A total of 76 participants in four out the five focus groups participated (the total number of participants was not provided for the focus group in PEI). In addition, NWAC completed a gendered and culturally-based analysis.

The focus group discussions were guided by a series of questions on the following subject-matters:

- legal traditions, customary law and cultural practices;
- community-based processes to deal with complaints, including the need for dedicated community-based resources to navigate the complaints process;
- case studies on work-place harassment and membership;
- considerations for First Nations women in deciding to use the CHRC complaints process (issues of safety); and
- discrimination issues affecting First Nations women, including sex-based discrimination in employment.

NWAC's report provides information on the needs of First Nations women in respect of the types of community-based processes to be put in place to deal with complaints at the community level in response to section 41 of the *CHRA*.[17]

Like the AFN's report, NWAC's report also provides information on issues relating to First Nations legal traditions, customary law and cultural practices in respect of human rights, which provides a useful context to the specific details of the needs assessment, particularly related to additional issues of relevance to First Nations women.

Report of the Congress of Aboriginal Peoples (CAP)

The Congress of Aboriginal Peoples (CAP) is a national body that advocates for the rights and interests of off-reserve non-status and status Indians, and Métis peoples living in urban, rural, and remote areas throughout Canada. Founded in 1971 as the Native Council of Canada, CAP has represented off-reserve Aboriginal peoples for 40 years in key areas including self-government, self-determination, Aboriginal and treaty rights, land claims, health and social programs, economic development, capacity building, research, and legal/political recognition.

To contribute to this Report, CAP held eighteen regional information sessions, with two sessions held in each province, except in Alberta, where only one session was held, and

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[17] Section 41. (1) of the *Canadian Human Rights Act* reads: Subject to section 40, the Commission shall deal with any complaint filed with it unless in respect of that complaint it appears to the Commission that

(a) the alleged victim of the discriminatory practice to which the complaint relates ought to exhaust grievance or review procedures otherwise reasonably available...

in Nova Scotia, where 3 sessions were held. In addition, a survey questionnaire was developed and distributed in the workbook used to support the dialogue sessions.[18]

The results of this study focused on the general knowledge and awareness of the *CHRA*, the CHRC structures and processes, and the nature of the amendments brought by Bill C-21. The report also highlighted discrimination experienced personally by CAP members.

[18] The number of total information session participants and the number of survey questionnaires returned were not provided by the Congress of Aboriginal Peoples in its submission.

Report of the Assembly of First Nations

Assessing First Nations Needs under the Canadian Human Rights Act

Introduction

The repeal of the section 67 exemption in the *Canadian Human Rights Act* (CHRA) as it applies to First Nations governments becomes effective June 19, 2011. During the three year transitional period mandated by the 2008 statute that amended the CHRA, the Government of Canada was required to undertake a study "with the appropriate organizations representing the First Nations peoples of Canada" to identify "the extent of the preparation, capacity and fiscal and human resources that will be required in order for First Nations communities and organizations to comply with the *Canadian Human Rights Act*" (under section 4).

The Assembly of First Nations (AFN) has worked hard to encourage Canada to work directly with First Nations and to take the necessary steps to ensure equality rights are protected on reserve lands in a manner consistent with the international human rights system.

In fiscal years 2009-2010 and 2010-2011, funding was provided by INAC to the AFN to carry out activities and studies relating to needs assessment issues. However, funding proposals from the AFN to begin capacity building and training activities, policy reviews and infrastructure modification directly with First Nations during the three-year transition period were not accepted. AFN is not aware of any funding being provided to First Nations directly to prepare for the application of the amended CHRA (apart from pilot project funding for one First Nation community).

Over the past two years, the AFN has worked with as many First Nations as could be reached within the resources, policy parameters and time frames determined by the federal government, to make AFN's contribution towards the section 4 needs assessment exercise. This chapter will provide an overview of AFN's assessment of the capacity, fiscal and human resources issues that need to be met if the CHRA is to be implemented in a way that respects (as much as is possible within the imposed legal framework of colonialism) all of the human rights of First Nations – both individual and collective. The *United Nations Declaration on the Rights of Indigenous Peoples*[19] now

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[19] *United Nations Declaration on the Rights of Indigenous Peoples*, adopted by the UN General Assembly by Resolution A/61/295, 61st period of sessions (September 13, 2007).

forms part of the international human rights system that must be used to inform the interpretation and application of the CHRA.

The CHRA must be interpreted and applied in a manner consistent with international human rights norms. First Nations, as indigenous peoples, are peoples equal to all other peoples and like other peoples, each holds the right to self-determination. The *UN Declaration on the Rights of Indigenous Peoples* did not create or grant this pre-existing right. The Declaration confirms that First Nations already hold, and always have held, this inherent collective human right. Canada is legally bound to respect First Nations' right to self-determination by virtue of the principle of the equality of peoples *and* by virtue of the legally binding nature of the *International Covenant on Economic, Social and Cultural Rights*[20] and the *International Covenant on Civil and Political Rights.*[21]

During the past two years, the AFN undertook three main activities as part of its contribution to assessing readiness issues:

1. assessing the new scope and implications of CHRA application through a jurisprudential review;
2. holding a series of regional engagement sessions where First Nations leaders and staff discussed the implications of the changed application of the CHRA to First Nations communities and the overall needs of First Nations respecting capacity, fiscal and human resources to ensure compliance with the amended CHRA;
3. designing and administering a survey of First Nations leaders and staff on their views of existing levels of awareness of the repeal and of the CHRA in general, communication mechanisms, training options, legal support, alternate dispute resolution processes and infrastructure modification needs.

The details and conclusions of this work, and what remains to be done to ensure preparedness, are summarized in this chapter. The outstanding work to ensure preparedness is substantial and consists of several components:

1. raising community awareness about the CHRA, carrying out much needed capacity building and training for First Nations leadership and staff;

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[20] *International Covenant on Economic, Social and Cultural Rights*, G.A. Res. 2200, 21 U.N. GOAR, Supp. (No. 16), 49, U.N. Doc. A/6319 (1966); Can. T.S. 1976 No. 46. Adopted by the General Assembly on December 16, 1966 and entered into force on January 3, 1976. In force for Canada on May 19, 1976.

[21] *International Covenant on Civil and Political Rights*, G.A. Res.2200 (XX!), 21 GOAR, Supp. (No. 16), 49 U.N. Doc. A/6316, Can. T.S. 1976 No. 47 (1966). Adopted by the General Assembly on December 16, 1966 and entered into force March 23, 1976. In force in Canada on August 19, 1976.

2. developing First Nations human rights policies, mechanisms and institutions;
3. bringing public buildings and housing owned by First Nations governments into compliance with the CHRA in order to meet the needs of persons living with physical disabilities.

This work needs to be carried out by First Nations governments but much of it is at risk of not taking place because of a lack of funding support. Ultimately, the work that needs to be done on Canada's part is rather obvious – to provide the funding needed to support First Nations governments in their community-based work. Expecting existing fund levels provided to First Nations governments to accomplish these tasks will not lead to preparedness.

Supporting First Nations in asserting their fundamental human right to self-determination is part of Canada's obligations under the *UN Declaration on the Rights of Indigenous Peoples* and these obligations include fiscal supports.

The ongoing implementation of the CHRA as it applies to First Nations must be undertaken in consultation directly with, and in cooperation with First Nations. This is required in order for Canada to comply with, and effectively implement, all of its obligations under international human rights instruments as they apply to indigenous peoples.

Purpose & Scope of the Section 4 Report to Parliament

It should be clear that the purpose of the study required by section 4 of the 2008 amendments is not study for the sake of study.

Implicit in section 4 is the intent that action actually be taken to ensure that First Nations can properly prepare for an expanded, and different, application of the *Canadian Human Rights Act* and to have the necessary "capacity and fiscal and human resources" to comply with the Act in a manner that is consistent with the fundamental human rights of First Nations, as peoples and individuals. It is important to note that the description of the study activities, and the report required by section 4 of the 2008 amending statute, refer to compliance with the amended CHRA as a whole. Section 4 does not restrict itself to the question of the impacts of the repeal of section 67 in its concern to ensure First Nations have the capacity and resources to ensure CHRA compliance.

The 2008 amendments changed the manner in which the CHRA is to be interpreted and applied in dealing with complaints made against First Nations governments (sections 1.1. and 1.2). The task of preparing for the application of the amended CHRA must take into account the work that will be required at the First Nation level to identify how First Nations customary laws and legal traditions apply to protect equality rights within First

Nations communities. The message from the regional engagement sessions was clear in this regard, that work must be undertaken to assist in the development and support of First Nations human rights institutions and dispute resolution processes.

Similarly, the United Nations Committee on the Elimination of Racial Discrimination has noted that the repeal of section 67 alone would not be enough to guarantee the equality rights of First Nations people in the application of the *Canadian Human Rights Act*.[22] Parliament responded by enacting sections 1.1 and 1.2 to accompany the repeal of section 67. The task of ensuring preparedness therefore includes preparing for the new application of the CHRA flowing from the totality of the CHRA in its current form which requires recognition of First Nations legal traditions and customary laws.

Every First Nation has its own legal and knowledge traditions and ways of expressing fundamental principles about how human beings should respect one another with respect and dignity. Many of these will apply to the areas of human interaction covered by the CHRA. This means that preparedness as referenced in section 4 must include planning and dialogue between First Nations and federal decision-makers such as the Canadian Human Rights Commission and the Canadian Human Rights Tribunal to harmonize the CHRA as much as possible with First Nations legal traditions and customary laws. This work will require examining procedural and evidentiary issues as well as First Nations contributions on how to best implement and restore First Nations values respecting equality, including gender equality, while respecting the minimum standards set by international human rights norms. Again, current levels of funding are not sufficient to accomplish this task.

States and their human rights commissions are required under international norms to support the human rights system at the international level. The CHRC has stated: "The Paris Principles oblige human rights commissions to work with and support the international human rights system. Human rights commissions are key elements of effective national human rights protection systems, and are required to ensure not only internal compliance with national human rights laws and practices, but also compliance with international human rights norms."[23]

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22 CERD. CERD/C/CAN/CO/18, 25 May 2007.

23 Canadian Human Rights Commission, *Framework for Documenting Equality Rights*, (Ottawa: The Commission, 2010) p. 7, citing Paris Principles relating to the Status and functioning of National Institutions for Protection and Promotion of Human Rights ("Paris Principles"), GA Res. 48/134, UN GAOR, 48th Sess., UN Doc. A/RES/48/134 (1993); UN GA, National Institutions for the Promotion and Protection of Human Rights: Report of the Secretary-General, UN GAOR, 13th Sess., UN Doc. A/HRC/13/44 (2010).

More specifically, ensuring equality rights are realized for First Nations people both within their communities and within Canada will require an approach to the interpretation and application of the CHRA that ensures consistency with international human rights norms. These now include the *UN Declaration on the Rights of Indigenous Peoples*. This will require dialogue between First Nations governments and the statutory bodies charged with implementing the *Canadian Human Rights Act*. The task of reconciling the CHRA with the fundamental collective and human rights of First Nations will be complex. The imposition of the CHRA, the *Indian Act* and many other laws undermine the enjoyment of the equality rights that First Nations are entitled to, as individuals, and as peoples under international law.

The Meaning of Preparedness

Preparedness needs cannot be assessed or achieved without having some notion of the scope of the CHRA and how it may apply to First Nations governments, as AFN's jurisprudential review shows. The purpose of section 4 is therefore tied to the larger purpose of the CHRA and amendments made in 2008.

First Nations people cannot fully enjoy equality as individuals or as peoples and nations if First Nations are treated as if they do not have cultural values or lawmaking capacity to ensure the protection of equality rights in a manner consistent with international human rights law. Just as the provincial and federal governments that are controlled by non-Aboriginal people are entitled, and obliged, to enact their own distinct human rights laws in their areas of jurisdiction, so too are First Nations governments. The 2008 amendments recognize that the repeal of section 67 alone is not sufficient to protect the equality rights of First Nations peoples in a way that would meet the requirements of international human rights law. Canada must support First Nations in developing their own human rights protections mechanisms; and must support the dialogue that must take place between First Nations, the Commission and the Tribunal to properly apply the CHRA in a First Nations context. Ultimately, First Nations human rights law must replace the CHRA.

We must consider what preparedness means in the context of the broader and different application of the CHRA created by the 2008 amendments and we must ask Canada what the fiscal plan is to achieve preparedness. Existing funding supports for "band governance" were inadequate prior to the 2008 amendments and nothing has changed since.

AFN Needs Assessment Activities (2009-2011)

In 2009-2010 and in 2010-2011, activities were undertaken by the AFN within the limits of federal funding, to identify some of the preparatory activities and the capacity and

fiscal and human resources required to ensure that First Nations can comply with the CHRA as it applies to First Nations. (In each of these years, funding was received late in the fiscal year).

AFN's review and analysis activities were undertaken as part of AFN's contribution to the report to Parliament called for by s. 4 of the 2008 amendments. (AFN Resolution No. 05/2008, Implementation of Bill C-21, Repeal of s. 67 of the Canadian Human Rights Act, July 16, 2008).

AFN Needs Assessment Survey Methodology

Nine regional engagement sessions were held between January and March 2010, attended by a total of 216 persons. An initial round of 52 survey responses was collected from people attending these sessions in early 2010. An additional 27 questionnaire responses were collected in November 2010, for a total of 79 completed questionnaires.

In terms of population coverage, the survey respondents were from communities/tribal councils of varying sizes. (See Table 1) Most respondents were from small communities (0 to 500 people) and intermediate communities (1,001 to 3,000) at 27.8% each of total surveys. Twenty percent of surveys were in the 3,000+ population group. The nine surveys from communities and tribal councils in this group included five respondents with populations between 10,000 and 24,000, and resulted in this group representing 72.3% of the surveys by population.

Table 1: Population Distribution of Community/Tribal Council Respondents

Population Groups	Number of Surveys	Distribution by Size	Population of Group	Percent of National Survey Population
0–500	22	27.8%	6,675	3.2%
501–1,000	14	17.7%	10,137	4.9%
1,001–3,000	22	27.8%	41,140	19.7%
Over 3,000	16	20.3%	150,984	72.3%
No Answer	5	6.4%		
Total	79	100.0%	208,936	100.0%

Table 2 illustrates the geographic variability of these responses. The INAC zone classification of service centres[24] was used in the survey as an indicator of geographic proximity or isolation of First Nations communities:

___ Zone 1 (within 50 km of a service centre)
___ Zone 2 (between 50 km and 350 km from a service centre)
___ Zone 3 (over 350 km from a service centre)
___ Zone 4 (air, rail or boat access is required to a service centre)

Almost all respondents (84.8%) were from Zone 1 and Zone 2, at 54.4% and 30.4% respectively of the survey population. Three responses were obtained from Zone 3, and seven from Zone 4. Due to the small numbers of these responses, Zone 3 and 4 community responses are shown as a single remote and isolated group (10 responses, 12.7%) in the presentation of results below.

Table 2: Geographic Zone of Respondent Communities

Geographic Zone	# Surveys	% of Surveys
Zone 1	43	54.4%
Zone 2	24	30.4%
Zone 3	3	3.8%
Zone 4	7	8.9%
No Answer	2	2.5%
Total	79	100.0%

The distribution of surveys was uneven across the regions. Most of the survey responses came from the Quebec, Atlantic, British Columbia and Ontario regions. All regions except one were represented, albeit at very low levels for some.
In the regional engagement sessions, 52 responses were received, and if viewed from the perspective of 209 regional participants, represented a response rate of 24.8%. A further 27 surveys were obtained in the November 2010 process and has boosted by 50% the rate of return, and also increased the input from Zone 3 and 4 communities.

24 Service Centre: A community where the following services are available: a) - supplies, material and equipment (i.e. for construction, office operations, etc.); b) - a pool of skilled or semi-skilled labour; c) - at least one financial institution, bank, trust company, credit union, etc.; d) - provincial services (such as health services, community and health services, environment services); and e) - Federal services (such as Canada Post, employment centre)

Summary of Findings of AFN Needs Assessment

There were five main areas of opinion targeted in the survey:

1. Community communication and education needs (understanding the level of awareness of communities about the CHRA and the repeal of section 67);
2. Policy review and legal support needs at the community level;
3. Training Needs of First Nations Governments;
4. Developing First Nations human rights mechanisms;
5. Community Infrastructure Needs to Accommodate Persons with Disabilities.

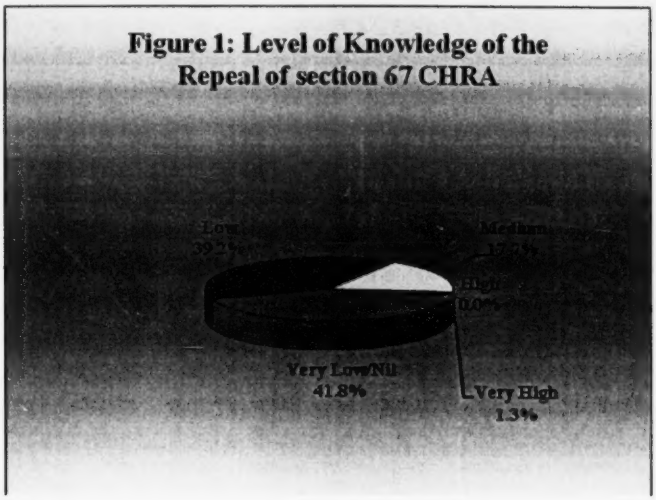
These areas were probed in a series of regional sessions and through a survey. The results of AFN's needs assessment study are provided in a December 2010 report entitled *Assessing the Readiness of First Nations Communities for the Repeal of Section 67 of the Canadian Human Rights Act*. A summary of this report is set out below.

Community Communication and Education Needs

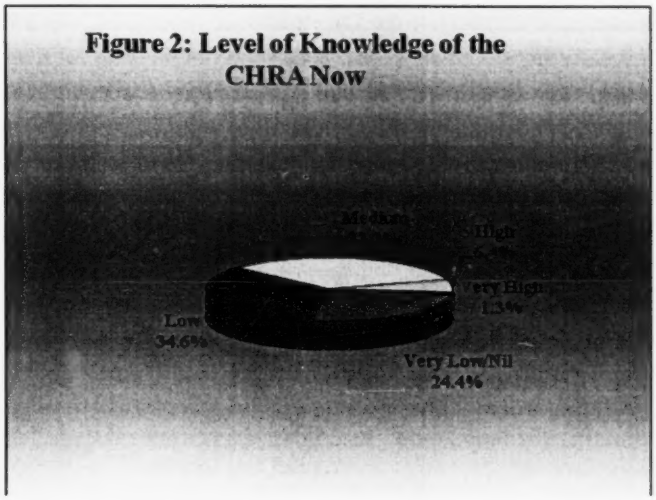
The AFN regional discussion sessions and the AFN needs assessment survey both indicate there is a low level of awareness of the CHRA and the repeal of s. 67 by leadership, staff and community members.

Raising awareness among community members about how the CHRA can apply to them, and what mechanisms are available for dispute resolution, will first require increased awareness by First Nations leadership and staff followed by the development and implementation of communication strategies by First Nations leadership and staff.

Prior to the adoption of the 2008 amendments, First Nations were not successful in convincing the federal government to undertake a proper consultation process directly with First Nations. The consequences of this lack of direct consultation are evident in the survey results. A large majority of respondents (81.0%) reported that Band or tribal council employees in their organization had a low or very low of knowledge regarding the repeal of section 67 in the CHRA.

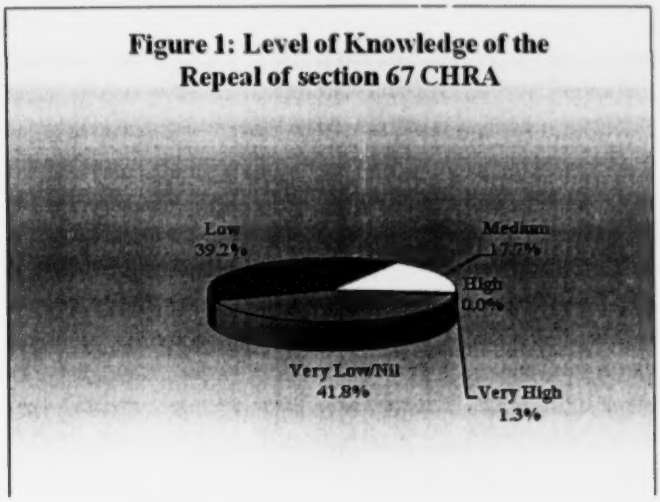


Regarding knowledge of the CHRA prior to the 2008 amendments, most respondents estimated the staffs' level of knowledge to be very low or low (59.0%). Communication and training activities respecting the CHRA generally and the 2008 amendments in particular will be a critical part of preparedness going forward.



Communication needs to prepare for the application of the CHRA exist at two levels. First, staff and Chief and Council need to be provided technical and legal information and training; secondly, resources are needed to engage community members to make them aware of their rights.

Overall, a strong communication protocol was envisioned, that should be led by Chief and Council who should be visible and carry a consistent message. This would be



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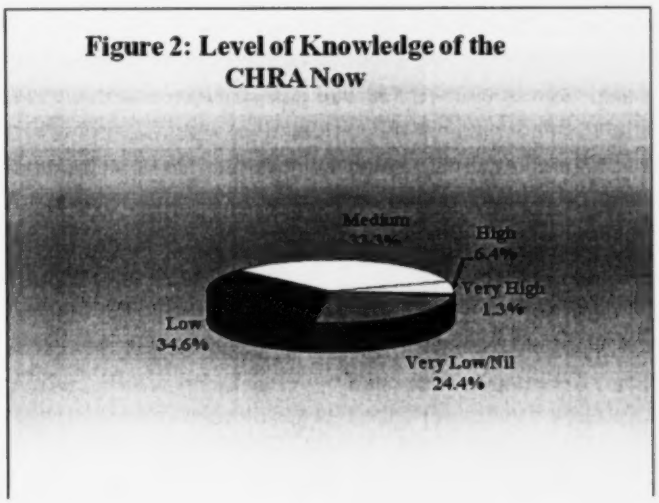

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followed by workshops for staff (requiring training, an issue discussed in more detail below) and targeting those persons who are on the front line delivering service. Communication activities must reach into community and could involve schools. However, participants in the regional engagement sessions pointed out that First Nations governments have limited funds for communication activities and there are a wide range of complex matters requiring community discussion at any time.

In AFN's December 2010 report, estimates were provided to implement an AFN communications strategy ($122,400) and to assist in the development of materials to support First Nations in policy review activities ($688,740). These estimates for proposed activities by the AFN do not include the costs First Nations would incur in actually carrying out their own communication activities and policy and legal reviews relating to CHRA compliance issues. An increase in the band governance support program dedicated to CHRA compliance should be provided to support the needs of First Nations governments in these areas.

In the regional sessions, it was evident that the recognition of First Nations' human rights practices grounded in traditional law and values was a primary interest of participants. Participants linked progress in the area of human rights for First Nation people to fundamental principles of self-determination, and further to the inherent right of self-government as an existing Aboriginal right under section 35 of the *Constitution Act, 1982*. The 2008 amendments to the CHRA directly affect the authority of a First Nation's governance functions as well as the collective rights of its members. Consequently, addressing community readiness needs and developing human rights mechanisms must be carried out through the implementation of inherent rights of self-government and international human rights law. Communication activities should include discussions on approaches to realizing First Nations human rights laws and mechanisms within the Canadian legal framework but the Canadian legal framework must be consistent with international human rights law including the *United Nations Declaration on the Rights of Indigenous Peoples*.

Some participants at the regional sessions, considered the 2008 amendments a good beginning (in that it at least thinks about the issue of equality rights in a First Nation context) but insufficient to ensure the equality rights of First Nations people consistent with international human rights norms. The first problem is the fact that the CHRA leaves First Nations human rights decisions to be made externally and in the hands of a Tribunal with little or no knowledge of First Nation legal traditions and customary law. A second problem is the lack of recognition and opportunities for the principles of self-government and development of First Nation specific human rights mechanisms. In other words, the CHRA addresses some equality rights issues but in a manner that is largely disconnected from the much larger pattern of human rights violations First Nations

people suffer under the *Indian Act* as a whole, and under federal legislation more broadly.

Policy Review and Legal Support Needs

The broader scope of CHRA compliance requirements arising from the repeal of section 67 affects all First Nations.

First Nations governments, and First Nations service organizations that fall under federal jurisdiction, have varying levels of capacity to develop new and review existing policies to ensure compliance with the CHRA as well as First Nations human rights values.

The engagement sessions and the survey indicate that First Nations require fiscal support to undertake two types of policy reviews:

a) A review of policies in areas that are already protected by the CHRA. For example, this includes anti-harassment, and duty to accommodate policies (e.g. maternity/parental leave, parental leave for same sex parents, Aboriginal-only hiring policy); and

b) A review of policies and laws previously shielded by section 67 of the CHRA.

Examples of areas requiring review for CHRA compliance because of the repeal of section 67 include:

- Band membership codes (re: eligibility of persons for membership in the Band);
- Band council elections under the *Indian Act* (e.g. is voting allowed for all Band members regardless of residence);
- custom leadership selection codes;
- bylaws made under section 81 of the *Indian Act;*
- management of moneys held in trust for Bands (e.g. access to funds of those who are denied membership);
- land management (individual holdings) in respect of land allotment; land use, occupation and residency; environmental management; and other land issues;
- access to programs and services, including housing, education and income assistance; and
- infrastructure with respect to accessibility for persons with physical disabilities.

The survey results suggest levels of preparedness are low in some critical areas. For example, of those participating in the survey, only 28.3% of communities had policies relating to accessibility of public buildings for persons with disabilities.

In addition, there are policy gaps in areas where the CHRA already was being applied to First Nations. For example, less than half of survey respondents said their First Nation has anti-harassment (46.8%) and duty to accommodate (35.4%) policies in their workplace (note: in a follow up question, 84% of communities requested training in these two areas).

A high proportion of communities requested training for their staff on general aspects of the CHRC and Tribunal (92%) and a similar percent of respondents also requested training on the repeal of section 67 and the associated policy review. Three-quarters of respondents reported a need for training on anti-harassment and duty to accommodate policy review and development.

All regions stressed the need for appropriate financing and/or legal support to undertake a policy review.

An increase in the band governance support program dedicated to CHRA compliance should be provided to support the needs of First Nations governments in these areas. A costing exercise based on a representative sample of First Nations governments needs to be carried out in order to estimate what these costs are likely to be. An estimate for AFN activities to support First Nations in policy review activities is $688,740. As mentioned above, this does not include the costs First Nations would actually incur to conduct their respective policy and legal reviews relating to CHRA compliance issues.

Table 3 shows the response to the survey question on the type of policies in existence in communities:

Table 3: Policies for Review

Type of Policy	Percent of Respondents
Policies regarding access to housing, education and income assistance programs and services	70.0%
Membership code	64.6%
Policies for land management	48.3%
Anti-harassment policy	46.8%
Election code approved under the *Indian Act*	45.6%
Duty to accommodate policy	35.4%
Custom leadership selection code	33.3%
Policies regarding access of members to moneys held in trust for Bands	31.7%
Policies related to accessibility of public buildings for persons with disabilities	28.3%
Section 81 bylaws	24.1%

Further complicating the challenge of meeting the known compliance requirements is the fact that there is a significant area of uncertainty about the scope of the compliancy challenge arising from the repeal of section 67.

Section 5 of the CHRA prohibits discrimination in the provision of services which are customarily available to the general public. There is uncertainty in the current state of the law about which decisions made under the authority of a federal statute constitute a "service" within the meaning of the CHRA. As one example, if the determination of entitlement to Indian registration under the *Indian Act* is not a "service" within the meaning of the CHRA as the federal government argues, then a similar argument can be made with respect to the decision-making under First Nation lawmaking in respect to band membership. Similar issues might arise with respect to a number of subject-matters under the bylaw sections and other sections of the *Indian Act*.

Another issue affecting the scope of application of the CHRA is the inherent jurisdiction of First Nations over human rights generally.

Training Needs of First Nations Governments

The engagement sessions and the survey both revealed a significant need for training in order for First Nations governments to meet the challenge of CHRA compliancy. The results of the survey suggest that 6,387 persons will require training in some aspect of the CHRA and its impact on communities. This works out to an average of 10 persons per community.

A high percentage of respondents to the survey saw a need for the training of staff on matters relating to CHRA compliance: "A high proportion of communities requested training for their staff on general aspects of the CHRC and Tribunal (92%) and a similar percent of respondents also requested training on the repeal of section 67 and the associated policy review. Three-quarters of respondents reported a need for training on anti-harassment and duty to accommodate policy review and development."[25]

Estimates to meet training needs through a national initiative based on two options and on suggested training approaches from the regional engagement sessions were developed by the AFN. Option 1 has an estimated cost of $6.5m and Option 2 has an estimated cost of $2.9m.

The survey also asked respondents their opinion about the best models for delivering training (Figure 3). Most respondents (65.4%) preferred that the relevant staff attend a

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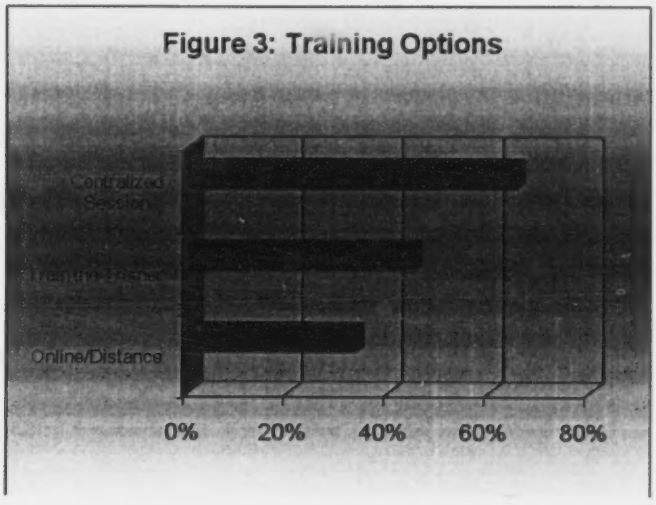
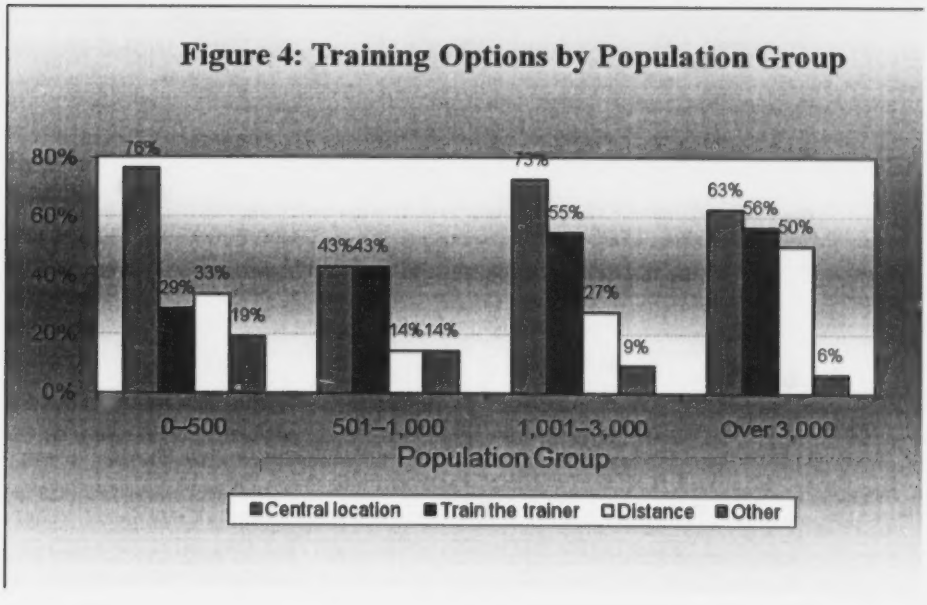
[25] Assembly of First Nations, Assessing the Readiness of First Nations Communities for the Repeal of Section 67 of the Canadian Human Rights Act, December 2010.

centralized session, such as regional or tribal council venues. The second most popular option was train the trainer (44.9%), which, given the high numbers of persons requiring training, would appear to be the most practical and cost effective option.

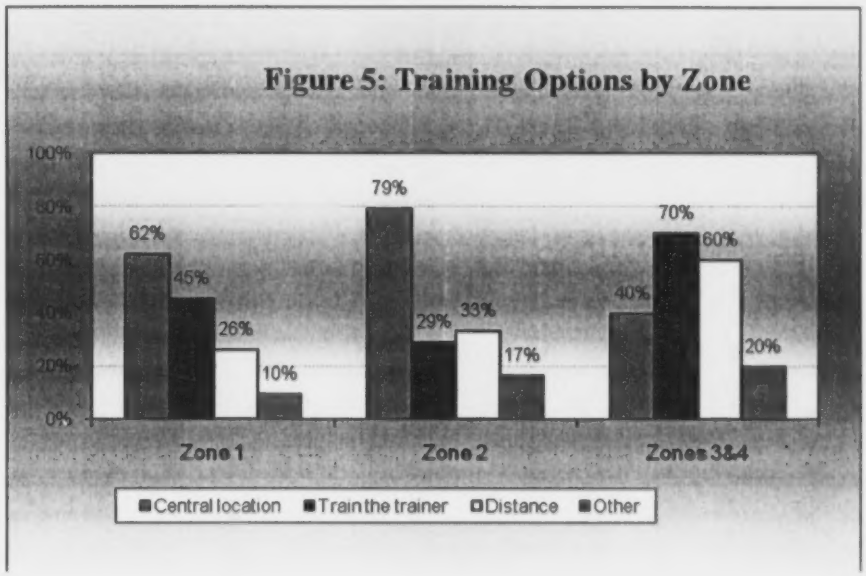


As is shown in Figure 4, respondents from larger population groups were more favourable to a train the trainer approach than those from smaller populations (range from 56% to 29%), although centralized training was the preferred option for all. The least favourite was distance training, such as on-line education or videoconferencing.



In the category of "other," offered options were essentially elaborations on the three suggested types of training, such as having customized workshops for boards delivered by teams of legal and other specialists, working with First Nations in close geographic proximity in joint training, and having customized DVDs and links to educational websites. In the regional meetings, it was suggested that training be cohort-based, to allow persons to train in groups, support each other, and provide cultural safety.

Figure 5 presents training preferences reported by zone of respondents. Respondents from remote and isolated communities clearly favoured train the trainer and distance modes of training (at 70% and 60 % of respondents respectively), whereas Zones 1 and 2 respondents' preferred option was training provided in a centralized location.



Developing First Nations Human Rights Institutions

Realizing equality rights within First Nations communities will require the development of First Nations Human Rights Institutions. The task of realizing equality rights and encouraging a culture of compliance must involve the restoration of First Nations values on the right way for people to treat one another. The realization of equality rights within First Nations communities will require institution/process building within First Nations governments.

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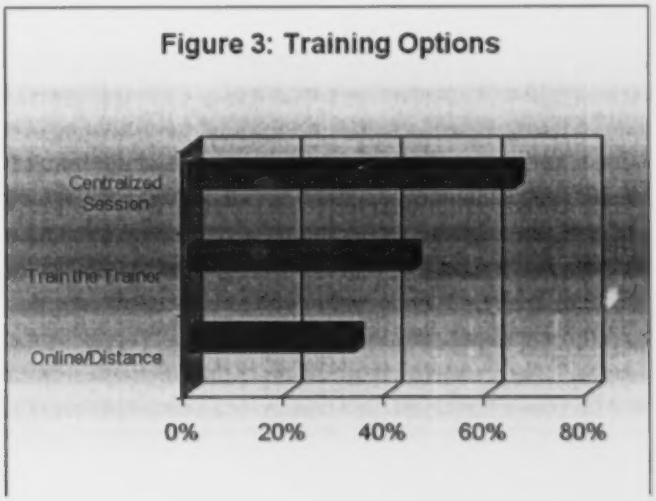

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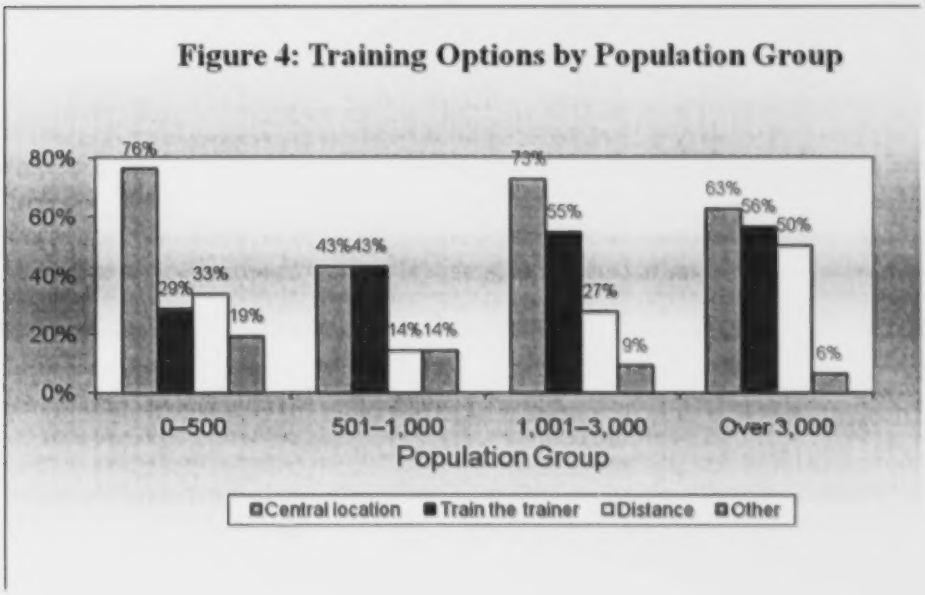

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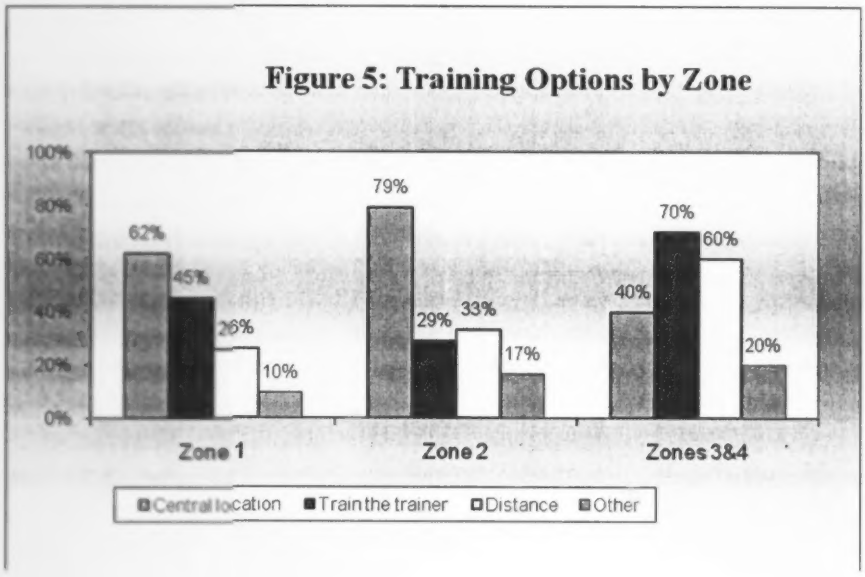

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The following activities have been put forward to encourage the development of First Nations Human Rights Institutions:

- Conducting an environmental scan or analysis of First Nation community human rights mechanisms.
- Developing guidelines for conflict resolution processes at community and nation/region levels (for use by the First Nations Human Rights Centre when established).
- Designing and implementing a national communication strategy
- Establishment of an Elders Council to advise on the s. 1.2 interpretive clause
- Establishment of a First Nations Human Rights Centre.

A budget for these activities is estimated to be $1.1m for the first 12 months.

These activities would be a first step to actually assessing the costs of implementing the CHRA in First Nations communities. For example, an analysis of existing First Nations dispute resolution mechanisms and a costing exercise based on a representative sample of First Nations governments is required in order to estimate what it will actually cost to support community-based dispute resolution concerning CHRA matters in First Nations communities.

Community Infrastructure Needs to Accommodate Persons with Disabilities

Management of First Nation-owned infrastructure, including First Nation-owned housing, has been shielded from review under the CHRA by section 67. With the s. 67 exemption removed, it seems likely that complaints of discrimination against First Nations governments will arise where infrastructure and housing cannot accommodate persons with disabilities.

Research suggests that First Nations people experience disabilities at twice the rate of non-Aboriginal people. In the case of adults overall, this means over thirty per cent have a disability. In the case of young adults, rates of disability are three times those for non-Aboriginal people.[26]

There is a critical lack of current data on the numbers of First Nations people on reserves living with physical disabilities and the cost of retrofitting public buildings in First Nations communities to meet the accessibility needs of persons with disabilities.

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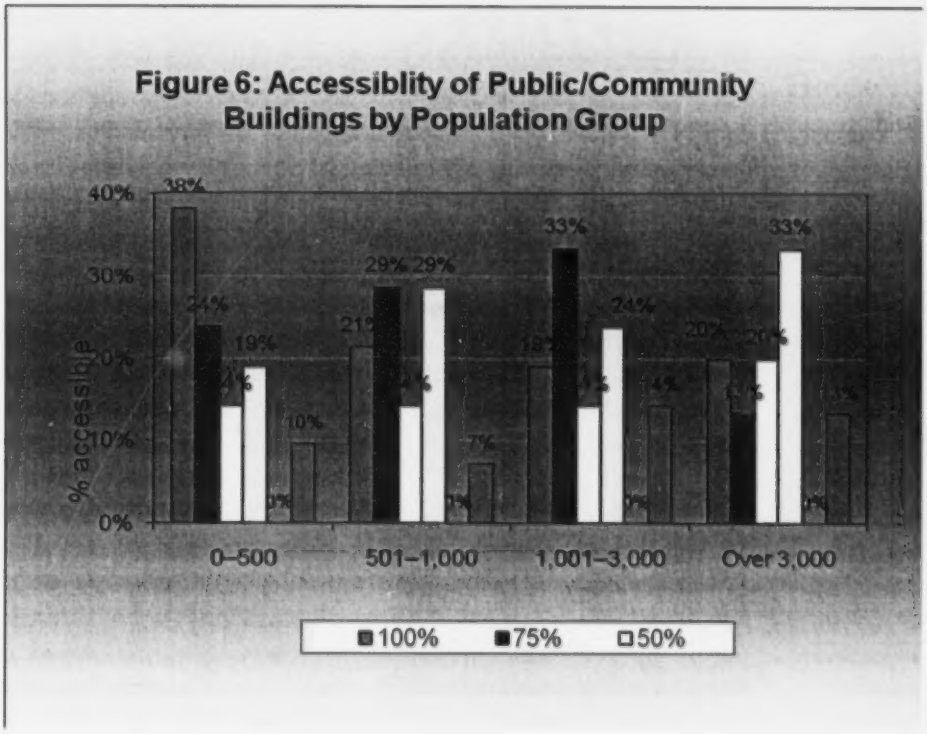
[26] Canada, In Unison 2000: Persons with Disabilities in Canada (2000).

The AFN concludes that an infrastructure asset review of accessibility needs and associated costs on a community-by-community basis should be undertaken in order to benchmark the existing need for infrastructure modification and to demonstrate a proactive approach if communities and/or INAC are investigated as part of a disability-related complaint. An asset review of all relevant infrastructures is a costly process, and a statistically sound sampling of communities is recommended. AFN estimates that an infrastructure asset review would cost $1.1million.

In the absence of a proper infrastructure asset review, the AFN undertook a rough estimate based on responses to questions in this area, provided by respondents to the survey. Seventy-nine respondents answered these questions.

Just over one-fifth (22%) of respondents said that all of their public/community buildings are accessible. The majority said that some of these buildings were accessible: 30% estimated that three quarters were accessible; 20% estimated half, and 28% estimated a quarter. These results are displayed by community size in Figure 6.



The cost per building to make the necessary renovations were rough estimates by respondents, and ranged from $1,000 to $75,000 with two additional respondents estimating that the per-building cost to be $150,000 or greater. The number of homes

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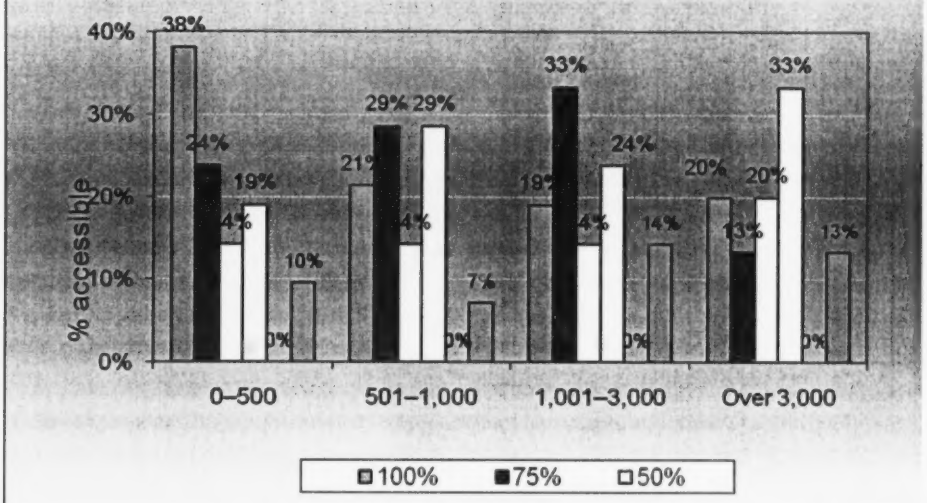
Figure 6: Accessiblity of Public/Community Buildings by Population Group



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requiring modification was highly variable, with some respondents unsure of the need in their community.

Estimates were developed for two categories of buildings on reserves:

(1) First Nation-owned buildings available to the public and to staff with disabilities, and
(2) First Nation-owned housing.

Approximately 1636 **public** buildings were estimated to require modification. The overall estimated cost of building modifications to accommodate persons with physical disabilities in First Nations communities is $50,562,128 (1,636 buildings at $30,898 each). If a five-year time line is assumed to roll out these improvements, the additional cost related to inflation is estimated to be $4,106,132 for a total commitment of $54,668,260.

In regard to band-own housing on reserve, a total ten year cost of funding additional home modification (excluding the costs from CMHC) is estimated to be $332.4 million, with annual funding commitments of $30.1 million in year one, increasing to $42.1 million in year 9, and a dropping to $7.1 million in year 10.[27]

In the regional sessions, it was noted that infrastructure modification will require a process, timeline and work plan. Teams will be needed, which include insurers, architects, builders and others. The composition of these teams will depend on which jurisdiction applies, and the existing building standards. Health and safety committees should be involved. Ensuring access can require structural modification (ramps, door access, taps, elevators, stairways) and also the creation of safety policies such as those which prevent obstructions in hallways. Access can also include road/lighting needs.

In the Yukon meeting, participants explained that as part of the requirement in signing self-government agreements, it was mandatory that First Nations accept the Band buildings in their existing condition.

One survey respondent described some accessibility problems in his/her community:

- *One administration building is partly accessible by the back, but there is not an automatic access on all the entrance doors. So you will have to find someone to assist you with a door once you are in. There is a wheelchair elevator that is shaky and has one jerk part way up and is frightening for a*

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[27] Infrastructure modification and other needs for persons with disabilities were covered in more depth in a disability case study (*Case Study: Ensuring the Inclusion of Persons with Disabilities in First Nations Communities*).

person who is not using a chair, because there is not a good place to hang on. Also you will have to find someone with a key and the ability to operate it. The front does not have an automatic door or a handrail to the bottom of both sets of steps.

- *A second administration building is partly accessible at the ground level, but not all floors and venues are accessible.*
- *A third building does not always have the automatic door turned on. Handicap accesses/ramps are far away from the door and often blocked by vehicles. Bathroom is difficult to get out of because of handle and strength of the door.*
- *A building containing justice services is difficult to access at both levels. Stairs are steep. A ringer before the stairway (with a sign) accommodates a person with disabilities. We come down to assist the person.*
- *Post office is difficult to access.*
- *Not all bathrooms or meeting rooms have handicapped handles and many doors are too heavy or handles are too high to open or not made for handicap people to grasp.*
- *There is an MCR to accommodate signing at meetings.*

All First Nations are concerned about meeting the needs of persons with disabilities in regard to public buildings, as well as band-owned homes. Participants in regional sessions spoke of the poor condition of infrastructure in general in too many First Nation communities. Identified needs included the following: wheelchair accessibility buildings and washrooms, electronic controls on doors, ramps, signage, and telecommunications devices for the deaf (TDD), and phone services for hard of hearing and deaf individuals. The participants also spoke about the need for disability and accessibility audits; however the cost for such audits has historically been too high to access.

Conclusion

There is considerable work outstanding to properly assess and prepare for the changes to the CHRA in a way that will ensure First Nations capacity to comply with the Act as a whole. This work must include commitments from the Government of Canada to provide new, dedicated sources of funding support to First Nations governments to support the protection of equality rights and human rights more generally.

There has so far been a lack of resources for First Nations to prepare at the community level for the application of the CHRA and to meet the new responsibilities flowing from the repeal of section 67. AFN's needs assessment provides an initial picture of the scope of the work that needs to be done and this includes much needed costing exercises.

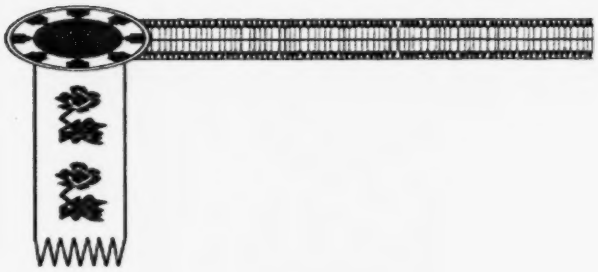
During the 36-month transition period, there has been no indication at all from the Government of Canada of what funding transfers will be made available to address these needs. This is a key concern identified by First Nations during the engagement

sessions and specifically applies to needs for developing communications strategies, community education, addressing infrastructure needs, carrying out much needed First Nations' policy reviews and the development of internal human rights mechanisms. The lack of resources to actually address the lack of preparedness has limited the effectiveness of the three year transition period.

The transition period mandated by the 2008 amendments was intended to provide First Nations with an opportunity to prepare for the repeal of section 67. However, the federal government has only seen fit to fund a needs assessment study by the AFN, and has not undertaken any preparations or a review of funding formula issues with First Nations to ensure that First Nations governments have the resources required to ensure compliance.

First Nations are eager to improve and develop human rights and dispute resolution mechanisms within their communities and expect Canada to comply with all international human rights norms.

Report of the Native Women's Association of Canada



Native Women's Association of Canada

The *Canadian Human Rights Act* and Aboriginal Women

Executive Summary Report and Focus Groups Recommendations

Native Women's Association of Canada

March 2011

Introduction and General Context:

The 2008 amendments to the *Canadian Human Rights Act* (*CHRA*) allowed for the repeal of section 67 of the *Canadian Human Rights Act* (*CHRA*). The *Canadian Human Rights Act* (*CHRA*) routinely prohibits specific forms of discrimination by federally regulated employers and service providers, in matters relating to employment, the provision of services and accommodation. However, the *Indian Act* has historically been exempted from the application of the Canadian Human Rights Act due to its distinct and unique provisions of services for Indians on reserve status lands, in accordance with the *Indian Act*. After the amendment, First Nations and their governments were allowed a three year moratorium from the application of the *CHRA* to allow them to adjust and further study how the application of the *CHRA* will affect their respective communities. This moratorium is now coming to an end and the application of the *CHRA* to First Nations government will take effect on June 18, 2011.

It is known that the scope of application of the *CHRA* to First Nation communities will be broader than it was before, as a result of these amendments. The repeal of section 67 means that provisions of the *Indian Act* itself may be reviewed for compliance with the *CHRA*, as well as policies used to apply the *Indian Act*. The repeal of section 67, also means that by-laws passed under the authority of the *Indian Act* or other decisions taken under its authority can be the subject of a complaint, where they concern matters of

employment, the provision of services or accommodation by a First Nation government or the federal government.

Section 2 of the *Canadian Human Rights Act,* reads as follows:

> The purpose of this Act is to extend the laws in Canada to give effect, within the purview of matters coming within the legislative authority of Parliament, to the principle that every individual should have an equal opportunity with other individuals to make for himself or herself the life that he or she is able and wishes to have, consistent with his or her duties and obligations as a member of society, without being hindered in or prevented from doing so by discriminatory practices based on race, national or ethnic origin, colour, religion, age, sex, marital status, family status, disability or conviction for an offence for which a pardon has been granted. [1976-77, c.33, s.2; 1980-81-82-83, c.143, ss.1, 28.][28]

Two interpretive provisions were included in the 2008 amendments. The first of these, s.1.1, confirms that the constitutionally protected Aboriginal and Treaty Rights of First Nations are not to be affected by the repeal of section 67 *CHRA*. A second interpretive provision, s. 1.2, ensures that when a complaint of discrimination is made under the *CHRA* against a First Nation government (this includes *Indian Act* band councils), the *CHRA* shall be interpreted and applied in a way "that gives due regard to First Nations legal traditions and customary laws." This means that there must be a balance in applying and interpreting matters of both individual rights and collective rights, in all *CHRA* decisions. This interpretive provision must also always be applied in a manner "consistent with the principle of gender equality". The applicable sections read as follows:

Section 1.2 of the *Canadian Human Rights Act:*

> **1.2** In relation a complaint made under the *Canadian Human Rights Act* against a First Nation government, including a band council, tribal council or governing authority operating or administering programs and services under the *Indian Act*, this Act shall be interpreted and applied in a manner that gives due regard to First Nations legal traditions and customary laws, particularly the balancing of individual rights and interests against collective rights and interests, to the extent that they are consistent with the principle of gender equality.

Based on an analysis written by gender equality specialists and legal scholars for the Native Women's Association of Canada, this Executive Summary Paper will summarize an analysis of the potential gender equality issues and legal concerns which arise in the

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[28] *Canadian Human Rights Act.* [1976-77, c.33, s.1.]

application of the *Canadian Human Rights Act*, to First Nations' governments and organizations.29 It will also present focus group recommendations held nationally with First Nations women in communities on the application of the *CHRA* in 2010.

The *Indian Act and Gender Analysis:*

The *Indian Act* has been a pervasive theme in the lives of First Nations people at every level since its enactment in 1876. The *Lavell* case brought the gender inequity to the forefront in 1974.[30] By 1985, the Bill C-31 amendment to the *Indian Act* attempted to remedy the colonial *Indian Act* provision, primarily related to status and membership.

However, today, in addition to bringing forward issues of status and membership, the McIvor case also brings forward issues of race, gender, culture, marriage and family status which the *Indian Act* continues to perpetuate.[31] The *Lavell* and *McIvor* cases have shown that the narrow focus on one aspect of an equality issue may omit other concerns from coming forward, in the analysis of human rights cases. This Paper emphasizes this point also.

It must be emphasized that the gender issue is not the only matter expected to come forward, as a result of the more expansive application of the *CHRA* to First Nations governments. The *CHRA* is expected to address a wide range of decisions and practices by both the federal government and First Nations governments in employment matters related to providing services to First Nations, including, discriminatory policies respecting the registration of persons as "Indians," and various government funding formulas, in the provision of essential government services on reserves.

From a collective perspective, there are inclusion and exclusion boundaries associated with status entitlements and reserve residence identity.[32] Aboriginal people negotiate their identities. Generally, band councils are creations of the *Indian Act* and questions remain as to whether Band Councils act in accordance with legal traditions or customary law, in dealing with individual rights and identity issues. The imposition of section 74 of the *Indian Act*, regarding elections, has also effectively controlled the customary and collective rights of First Nations peoples to determine elections according to custom, as well as, land management/wills and estates which also impact upon individual's rights.

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29 Culturally Relevant Gender Based Analysis: An Issue paper. Ottawa: the Association (March 31, 2010). 3 First Nation Women's organization– Sagamok Anishnawbek First Nation (February 17 & 18, 2010); Mothers of Red Nations (March 19, 2010); Aboriginal Women's Association of PEI (March 20, 2010); Nova Scotia Native Women's Association (Halifax, March 6, 010); Eskasoni First Nation women/Nova Scotia Native Women's Association (March 9, 2010).

30 *Lavell* v. *Canada (Attorney-General)* [1974] S.C.R. 1349 (S.C.C.).

31 McIvor v. Canada (Registrar of Indian and Northern Affairs), 2009 BCCA 153 (CanLII).

32 Lawrence, Bonita. *"Real" Indians and Others*. Vancouver Toronto: UBC Press, 2006.

These will be subject to review should a complaint come forward. From a Native women's perspective, the potential isolation and retribution upon Human Rights complainants is a real concern given the patriarchal nature of First Nations governments.[33]

The cross-cutting and multi-generational impacts of discrimination affecting particular segments of the First Nations population also must be kept in mind. For example, systemic discrimination in the funding of child welfare programs and education on reserve most directly affects First Nations children but also serve to perpetuate inequalities between First Nations people and Canadians generally, over the long-term.

Direct discrimination based on sex against First Nations women under the *Indian Act* likewise has had many multi-generational impacts and negative impacts on First Nations communities. Sex-based discrimination combined with other forms of discrimination in the determination of Indian status entitlement or band membership under the *Indian Act*, (i.e.: the arbitrariness of the second-generation cut-off rule as in *McIvor*) create very complex issues of discrimination analysis in First Nations communities.

In addition, these are further compounded by unresolved issues in federal funding formulas in many areas of basic government services (education, child welfare, capital funding, etc.). Violence and intolerance is perpetuated against women in decisions that consistently fail to meet the needs of women by not addressing budgets related to the need for shelters and housing allocations in capital plans and budgets.
In the context of applying the *CHRA* to complaints of discrimination arising from First Nations communities, a culturally relevant gender-based analysis will require a capacity on the part of the Commission, as well as appropriate Commission and Tribunal procedures and resources, to identify and appropriately apply the legal traditions and customary laws of a specific First Nation while respecting the "principle of gender equality."

The Importance of Critical Gender Based Analysis:

Aboriginal women's experience of discrimination often involves multiple aspects of identity and grounds for discrimination. Even when a single ground of discrimination (sex or gender) may be the focus of a given fact situation as in sexual harassment in employment situations, there must be an attempt to understand the larger context of Aboriginal women's experience in Canadian society. An understanding of racism, violence and stereotypes about Aboriginal women are necessary to fully understand the dynamics of harassment in its many forms which are experienced by Aboriginal women.

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33 Part III of the Balancing Individual and Collective Rights Report, 62.

Aboriginal women can experience discrimination through manifestations of many forms. Discrimination can be based on any combination of gender, race and culture, and it can intersect with any combination of age, disability, sexual orientation or other ground of discrimination. Ensuring the equal enjoyment of all human rights by Aboriginal peoples necessarily involves the assertion of fundamental human rights at the collective, as well as, the individual level.

NWAC emphasizes that there are ongoing collective inclusion and exclusion boundaries associated with status entitlements and reserve residence identity.[34] Many forms of discrimination and oppression experienced by Aboriginal women within their communities, and outside them, are the products of colonization, the denial of First Nations right to self-determination and the long historical imposition of Eurocentric policies upon them. These policies were characterized "by patriarchal norms which had a negative impact on the status of Aboriginal women in Canadian society and within Aboriginal societies in Canada, as well".[35]

Gender-based analysis warns also about how adopting an exclusive focus on gender alone can obscure other discriminatory practices affecting Aboriginal women from being considered. The Canadian Research Institute for the Advancement of Women acknowledges the need for this type of approach, as follows:

> While GBA has brought greater awareness of women's inequality relative to men, a 'gender only' lens that primarily looks at differential gender impacts or discrimination between women and men fails to account for the complexity of women's lives. Prioritizing one identity entry point (gender) or one relation of power (patriarchy) to the exclusion of others, (race and class), misrepresents the full diversity of women's realities, applying only one entry point into analysis simplifies and reduces what are actually very complex systems of oppression.

For example, discrimination experienced by First Nation women who "married out" prior to 1985, is about more than gender and racial discrimination. It often involves assumptions about people who have lived off-reserve for a period of time. Being a person reinstated under the 1985 amendments has become a label in itself that can become a ground for a claim of discrimination. There are concerns that the legislation introduced to respond to the *McIvor* decision will create similar controversies and problems around integrating newly reinstated persons.

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[34] Wendy Cornet et al. A Paper prepared for the Native Women's Association of Canada. Section 1.2 of the Canadian Human Rights Act: Balancing Collective and Individual Rights and the Principle of Gender Equality (July 15, 2010).

[35] Native Women's Association of Canada, Culturally Relevant Gender Based Analysis: An Issue Paper, Ottawa: The Association, 2007.

While discrimination on grounds of sex is prohibited under the *CHRA,* the *Act* does not define "the principle of gender equality." The CHRC has explained the meaning of "gender bias" in the context of federal employment equity legislation, as "any factor or behaviour which, even unintentionally, unfairly favours one sex over the other."[36] Gender bias would be evident, for example, in a consistent pattern of inequitable access to resources by women within the community, such as: housing or employment. This is a real concern for Native women.

Legal Analysis - Defences and Interpretive Provisions within the *CHRA*:

The most common defences used to justify an infringement of an individual right under the *CHRA* are those of bona fide occupational requirement in s. 15(1)(a) and bona fide justification in s. 15(1)(g) of the *CHRA*. The Native Women's Association of Canada cautions that the consideration of these two defences, including the "undue hardship" defence may open the door to the mediation of substantive equality rights and interests. The Native Women's Association maintains that under this approach, section 1.2 cannot be treated as an exemption or a technical defence. Section 1.2 is best viewed as a general interpretive guideline that may have application at each stage of the analysis from determining the standing of the complaint to the resolution of the complaint, which includes the assessment and application of any defence, asserted by a First Nation defendant.

This analytical approach would also mean, for example, in appropriate cases that the socially-constructed nature of identity concepts like "Indian," "band member" or "First Nation citizen" as they are used in First Nations laws, by-laws, policies and other First Nation decision-making tools, must be examined. These instruments ultimately determine access to programs, services, accommodation or employment in First Nations governments or organizations.

Prior to the 2008 amendments, several cases were brought forward by First Nations women essentially based on their status as persons reinstated to Indian status under "Bill C-31," explicitly relying on multiple grounds of discrimination; such as: sex and marital status or sex and family status. These complainants met with mixed success for various reasons, including the operation of the section 67 exemption, they were: "Indian", "Native", "white male" (*Dawson* v. *Eskasoni* [37]); "Caucasian", "native", "aboriginal" (*Dewald* v. *Dawson Indian Band Council*[38]); 'native", "caucasian", "white",

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[36] Canadian Human Rights Commission website, http://www.chrc-ccdp.ca/publications/federal_jurisdiction-en.asp?highlight=1

[37] 2003 CHRT 22.

[38] 1993 CHRT 15.

"white non-native" (*MacNutt* v. *Shubenacadie Indian Band Council*[39]); "white father", "Indian" (*Raphael* v. *Conseil des Montagnais du Lac Saint-Jean*[40]) ; and "native Indian." Joanne St-Lewis notes that European-based values and practices of analysis are so pervasive that these terms would be rendered "invisible" or neutral as aspects of the Canadian legal system.[41] She adds that the power of outside bodies like the CHRT to determine these kinds of issues carries a risk of perpetuating colonial biases.[42]

The arbitrary way in which the *Indian Act* band membership and Indian registration provisions with regard to federal decisions is now reviewable under the *CHRA*. First Nation membership codes and residency by-laws will be reviewable under the *CHRA*. To deal with cases in a culturally relevant gender-based manner, the CHRT will have to be mindful of concepts of race, culture, band membership and First Nation citizenship and will need to carefully consider and explain any terms it may use to refer to issues involving race, culture or citizenship, when identifying and analyzing issues of equality, under the *Indian Act*.

CHRC Tribunal Powers:

A special CHRT Tribunal has been established to deal with equality rights generally and First Nations equality rights, in particular. This Tribunal will be charged with dealing with employment, accommodations (housing) and provisions of service, to streamline the CHRT complaint process. This will allow the courts to deal with complex constitutional issues. Since the Supreme Court cases of *Conway and Druken,* it has been determined that the Tribunal does have the ability to strike down and declare subordinate legislation, such as: a regulation or by-laws, as inoperative. The question to be determined in *CHRA* cases is whether the matter in dispute is considered a "service." [43] Since 1985, Indian status entitlement is primarily used to determine entitlement and federal funding responsibility for a wide range of programs and services. Band membership under the *Indian Act* determines entitlement to vote in First Nations band council elections, as well as, access to other collective rights and interests under the *Indian Act*. The uncertainty about what the term "services" means that under the *Indian Act* will have to be scrutinized in *CHRA* cases which come before the Tribunal.

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39 1995 CHRT 14.

40 1996 CHRT 10.

41 St. Lewis, Joanne. "Race, Racism and the Justice System" in Carl James. Ed., Perspectives on Racism and the Human Services Sector (Toronto: University of Toronto Press, 1996) 100 at 111.

42 Ibid.

43 R. v. Conway, 2010 SCC 22 (June 11, 2010). Canada (Attorney General) v. Druken [1989] 2 F.C. 24, leave to appeal denied (1989), 55 D.L.R. (4th) vii (S.C.C.) [Druken]. McKay, Cornell, 40.

Analysis of First Nations Legal Traditions and Customary Laws:

There is a tendency to equate the terms First Nations legal traditions and customary laws with "existing and Aboriginal and Treaty rights." [44]The balancing of customary laws and traditions with individual rights and interests is the ultimate objective of the section 1.2 *CHRA* analyses. It is important to know what the terms may mean.
A holistic, complementary perspective on the relationship between individual and collective rights is more typical of indigenous perspectives. Indigenous peoples generally recognize that collective and individual rights are mutually interactive, rather than in competition."[45]

Again, the historical effect of the *Indian Act* and its undermining of individual and collective rights now pose challenges to the understanding First Nations customary forms of kinship, identity, family, cohesion, community and nationhood. First Nations customary practices may not always be held as a valid basis for defences against discrimination with regard to individual rights or interests. Procedures or techniques are needed to distinguish between what is 'traditional' or 'customary' and what is derived from introduced forms where a claim on individual rights is made, particularly on important issues affecting women.

Culturally Relevant Gender-Based Analysis in a First Nations context means the marrying of legal traditions and customary law to bring gender equality forward. In examining discrimination claims against First Nations governments under the *CHRA*, an *Intercultural Human Rights Approach* is needed to assist in bridging differences between First Nations and Western knowledge traditions, legal traditions and approaches to problem solving in a consistent equality rights context. This "intercultural" approach signifies an understanding of what substantive equality means.[46]

NWAC has identified an *Intercultural Human Rights Approach* to carrying out culturally relevant gender-based analysis. It involves making policy and legal analysis based [47]on pre-contact gender relations and a thorough understanding of how colonial assimilation policies have impacted First Nations societies. It is based on the analysis of the current realities, in a way which reflects the cultural diversity of First Nations social and

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44 John Burrows, Canada's Indigenous Constitution 24.

45 Cyndi Holder and Jeff J. Corntassel, "Indigenous Peoples and Multicultural Citizenship: Bridging Collective and Individual Rights," (2002) 24(1) *Hum. Rts. Q.* 126 at 128–129.

46 Native Women's Association of Canada. 2007. *Culturally Relevant Gender Based Analysis An Issue Paper.* Ottawa: The Association; Native Women's Association of Canada. The Canadian Human Rights Act and Aboriginal Women (March 31, 2007) 7.

47 Native Women's Association of Canada. 2007. *Culturally Relevant Gender Based Analysis An Issue Paper.* Ottawa: The Association 7.

economic situations. In addition, there must be strategies and solutions which involve analyzing current social conditions and the potential effect of legislation, on a multitude of individuals and situations.[48] Balanced gender-based equality analysis means incorporating and developing a holistic analysis of complex forms of discrimination, according to individual experiences, realizing that these experiences cannot be separately analyzed and may impact each other.

An *Intercultural Human Rights Approach* to interpreting and applying section 1.2 would view the right of self-determination and individual human rights of First Nations people as inter-dependent and complementary which reinforce one another, consistent with international human rights theory and law.[49] It is important to note that culture applies to all concepts of property and how people relate to land use, territory, entitlements and in their procurements of goods. In the absence of the recognition of First Nations governments through policy, legislation or constitutional amendments, the pre-colonial *Indian Act* continues to apply in First Nations' communities which affect how people relate to one another. Indian status, band membership, wills and estates, elections and reserve land management have been flagged as examples.

This will be especially important in working through claims involving the persistent gendered definitions of Indian status and band membership which lie at the heart of claims of residual sex discrimination under the *Indian Act.* This includes other claims of discrimination against persons reinstated under the 1985 amendments to the *Indian Act* or any legislation adopted to respond to the *McIvor* case. Changes in approaches to investigation techniques, mediation techniques and evidentiary requirements may be needed to ensure the CHRC and the CHRT has an adequate factual basis on which to deal with these complaints, such as: procedures to explore the complainant's and respondent's understanding of various identity terms.

A culturally relevant gender based analysis of systemic discrimination, for example, might examine relevant facts, such as: the role the *Indian Act*, and the role that Indian agents played in excluding women from land allotments. Another aspect of such an analysis would examine how such biases may have been carried forward or corrected by First Nations councils in their decision-making policies and the federal government in their funding formulas.

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[48] Native Women's Association of Canada. 2007. *Culturally Relevant Gender Based Analysis: An Issue Paper.* Ottawa: The Association 7.

[49] It should be noted that while the application of the *CHRA* to First Nations governments may be rationalized as an integral part of Canada's accountability to the international human rights system to ensure the universal application of human rights to all people in Canada, this rationale does not answer how Canada is accountable for ensuring respect of First Nations' right to self-determination consistent with international law as articulated by the *United Nations Declaration on the Rights of Indigenous Peoples.*

The principle of individual participation rights raises the issue of how best to ensure the participation of First Nations women in any discussions of what constitutes First Nation legal traditions and customary laws and cautions on the dangers of having judicial on non-Aboriginal decision-makers hold all of the power, in determining matters relating to tradition in societies of which they are not members or for which they may have little knowledge.

Regarding collective rights protections for culture, Brems argues that when issues regarding protection of cultural values arise, there cannot be a static understanding of "tradition."[50] She further argues that community members, male and female, must have an opportunity to shape the legal expression of contemporary cultural norms. The principle of individual participation rights raises questions about how best to ensure the participation of First Nations women in any discussions of what constitutes a First Nation legal tradition and customary law and questions about the dangers of judicial decision-makers drawn from outside the nation having the power to determine matters relating to tradition in societies of which they are not members.

Wendy Hulko notes that an individual's social location can determine perceptions, experiences and participation and can vary in different circumstances. This can affect the degree of privilege (institutionalized power) or oppression (imposed disadvantage) an individual may experience in any given context. [51] An individual's social location shapes his or her experiences across different socio-cultural contexts, in terms of the relative degree of privilege and oppression he or she is afforded and has at his or her disposal. In addition, a person's social location itself can be influenced by the particular phase of their life course.[52] The same concept of social location and its impact on rights also applies to the privileged position of outside judicial decision-makers empowered to make rulings about First Nations legal traditions and customary laws and deciding issues of equality, in First Nations communities. Due to their privileged position in a legal system, they fail to acknowledge and recognize the inherent law-making powers of First Nations.

There are many ways of carrying out culturally relevant gender-based analysis, whether for a single First Nation or a national organization. As a national organization concerned with issues of law and policy affecting Aboriginal women, NWAC has developed an

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50 Brems, Eva. Human Rights: Universality and Diversity at 490; Brems, Protecting the Human Rights of Women at 124.

51 Hulko, Wendy. "The Time and Context-Contingent nature of Intersectionality and Interlocking Oppressions," Journal of Women and Social work 24 (2009) 44.

52 Ibid.

approach to carrying out culturally relevant gender-based analysis with four key elements:[53]

1. Grounding all policy and legal analysis in an understanding of pre-contact gender relations when Aboriginal citizens, female and male, were valued equally and lived in self-determining communities.
2. Identifying the negative impacts on individuals, families and nations of colonization and assimilation policies including the negative impact on gender relations that accompanied colonization.
3. Conducting an analysis of current realities (informed by the first two elements) and identifying areas requiring for change to meet all the equality needs and rights of Aboriginal women (e.g. as women, as indigenous, as disabled, etc.) and in a way that reflects the cultural diversity of Aboriginal peoples and their varying economic and social situations. This can involve collecting relevant socio-economic statistics, analyzing current social conditions and analyzing the impacts of legislation that lead to gender inequalities.
4. Developing and implementing strategies and solutions informed by the first three elements. These strategies and solutions may require sameness of treatment in some cases and in others, equality may require gender-specific measures, indigenous-specific measures and/or measures specifically developed for indigenous women or women with disabilities or other needs.[54]

These four elements are visually represented as points around a circle with the foundational concept of 'balance' situated in the centre. The concept of "Balance" represents an approach that recognizes the relationship between gender inequality and other forms of discrimination and oppression and embraces diverse traditional Aboriginal values that are consistent with the values of both women and men.

It is however also noted that biases may result in an exclusion of women's voices and an over-reliance on experts."[55] Likewise there are issues about how the CHRC, the CHRT and the Courts will approach questions such as the relative weight to be given the testimony of Elders and other authorities on First Nation law, compared to that of academic "experts." The difficulty of accurately identifying First Nation legal traditions and customary laws, grounded in a very different worldview and knowledge tradition

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53 Native Women's Association of Canada. 2007. *Culturally Relevant Gender Based Analysis An Issue Paper*. Ottawa: The Association.

54 Native women's Association of Canada. 2007. Culturally Relevant Gender Based Analysis An Issue Paper. Ottawa: The Association.

55 Lawrence, Sonia N. "Cultural (in) Sensitivity: The Dangers of a Simplistic Approach to Culture in the Courtroom". *Canadian Journal of Women and the Law* 13 (2007) 107 [*Lawrence, Cultural (in)Sensitivity*].

from that which has informed the mainstream of the Canadian legal system, is not to be underestimated.

Due to the fact that the legislation to be applied is from outside the community, there will be a process of learning by First Nations governments and the *CHRA* to come to terms with the equality provisions of the *CHRA* and to strike a balance in understanding the unique aspects of customary laws and practices, from a First Nations' perspective.

The Canadian Human Rights Commission is promoting a case by case, section by section analysis in the resolving of discrimination cases which come forward under the *CHRA*. This makes the importance of culturally gender-based analysis even more imperative. It must be noted that the *CHRA* places the burden on complainants to come forward who do not always have access to legal resources within their communities or they may not feel that they are able to (Native Women's Association of Canada emphasis added).[56]

Culturally Appropriate Dispute Resolution:

The Canadian Human Rights Commission anticipates that its programs will need to be "more accessible and culturally sensitive to First Nations people and communities"[57] and that it will need more resources to ensure its complaint process is "culturally appropriate."[58] In its Still *A Matter of Rights* report, the Commission argued that a transition period was necessary to phase in the repeal of section 67 as its affects First Nation governments, in order to allow for the implementation of "culturally appropriate, community level initiatives to prevent discrimination, and to ensure that complaints are resolved quickly and with a minimum of conflict."[59] The CHRC also emphasizes that it focuses much of its efforts on prevention and early resolution of complaints, including the use of alternative dispute resolution (ADR).

Conflict resolution values and processes tend to be culturally bound. Court annexed ADR processes in Canada must be aware of the diverse cultures from which litigants come. Nevertheless, the professional practice of ADR in Canada is still dominated by conflict resolution values and procedures reflective of "Western" societies. The

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56 Canada, House of Commons Standing Committee on Aboriginal Affairs and Northern Development, *Evidence*, 40th Parliament, 3rd Session, Issue 11:2 (April 2010) (Chief Commissioner Jennifer Lynch).

57 Canadian Human Rights Commission website, http://www.chrc-ccdp.ca/nai_ina/default-en.asp?highlight=1

58 Canadian Human Rights Commission. *2009-2010 Report on Plans and Priorities.*

59 Canadian Human Rights Commission. *Still A Matter of Rights: A Special Report of the Canadian Human Rights Commission on the Repeal of Section 67 of the Canadian Human Rights Act.* (January 2008).

presumption that conventional western ADR practices are culturally neutral is considered problematic for Indigenous peoples and other peoples, who have experienced colonization and 'racialization.' Legal systems and dispute resolution processes that presume their own neutrality despite the exclusion and silencing of indigenous values and perspectives constitute a continuation of the colonization process.[60]
The CHRC has not yet described how it will approach early conflict resolution in First Nations communities or how its current techniques of mediation and conciliation are considered workable or not in a First Nations context. The CHRC commissioned some preliminary research work[61] which summarized the work of Bell and Kahane[62] and others on what the issues and challenges are. What is needed are concrete models of how conflict resolution can be applied to human rights disputes, under the *CHRA* to First Nations communities. Such models must take into account gender issues. This brings forward the issue regarding how the CHRC plans to modify or adapt its current reliance of Western models of conflict resolution to accommodate the diversity of First Nations models of conflict resolution, and how it will take into account gender based approaches to community based conflict resolution.

Cultural differences can affect what people expect from a conflict resolution process and what they perceive as fair outcomes. Indigenous approaches to conflict resolution are often described as focused on "conflict transformation," in that they seek to heal relationships and restore harmony. While western conflict resolution methods focus on immediate and substantive outcomes, in the form of an agreement between parties. Differences in cultural values relating to individualism and collectivism are reflected, including the role of the mediator or process facilitator by way of how the facts are brought out, the way conflict is analyzed and understood and the degree of formality of the conflict resolution process itself.[63]

Where issues arise respecting indigenous perspectives on the balancing of collective and individual rights, the design of conflict resolution processes must ensure that men's and women's voices are given equal weight and value.

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60 Walker, Polly O. "Decolonizing Conflict: Addressing the Ontological Violence of Westernization", American Indian Quarterly 28 (2004) 527[Walker, Decolonizing Conflict].

61 Victor, Wenona. "Alternative Dispute Resolution (ADR) in Aboriginal Contexts: A Critical Review". Prepared for Canadian Human Rights Commission. (April 2007).

62 Bell, Catherine and David Kahane (eds.), Intercultural Dispute Resolution in Aboriginal Contexts (Vancouver: UBC Press, 2004).

63 Walker, Decolonizing Conflict; Ellis, Desmond and Dawn Anderson. Conflict Resolution: An Introductory Text. (Toronto: Emond Montgomery Publications, 2005), Chapter 5, Culture; McGuire, Patricia, Restorative Dispute Resolution in Anishinaabe Communities –Restoring Conceptions of Community based on Dodem, Research Paper prepared for the National Centre on First Nations Governance, May 2008.

The United Nations Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya, has suggested that the implementation by indigenous peoples of the UN *Declaration on the Rights of Indigenous Peoples* may require indigenous peoples to develop or revise their own institutions, traditions or customs through their own decision-making procedures.[64] He notes the Declaration suggests the functioning of indigenous institutions should be "in accordance with International Human Rights standards" (art. 34) and that the Declaration calls for particular attention "to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities," including the elimination of all forms of discrimination and violence against indigenous children and women (art. 22).

Human rights instruments, such as, the *Convention on the Elimination of All Forms of Discrimination Against Women* (CEDAW) and the *United Nations Declaration on the Rights of Indigenous Peoples*, also provide direction on gender equality issues. Article 5 of the CEDAW requires State parties to take all appropriate actions to eliminate prejudices, customary and all other practices based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women. This is a very comprehensive reference, capturing prejudices and all other practices, as well as, customary practices.

Focus Group Recommendations:

The Focus Group Presentation Approach:

Each of the five focus groups were organized with the assistance of First Nation community members or a First Nation Women's organization– Sagamok Anishnawbek First Nation (February 17 & 18, 2010), Mothers of Red Nations (March 19, 2010), Aboriginal Women's Association of PEI (March 20, 2010), Nova Scotia Native Women's Association (Halifax, March 6, 2010), Eskasoni First Nation women/Nova Scotia Native Women's Association (March 9, 2010). A sixth focus group was planned for March 31st at Musqueam First Nation but had to be cancelled due to the death of an Elder.

At each focus group, an information kit, prepared by NWAC, was provided to the participants. The kit provided general information about the *CHRA:* the Roles of the Canadian Human Rights Commission and the Canadian Human Rights Tribunal, the Process of Making a Complaint, the Purpose and the Limitations of the Act, and some commentary on Aboriginal Perspectives on Human Rights and Approaches to Conducting Culturally Relevant Gender-based Analysis. While these five sessions may

64 Anaya, Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, at para 79

present limitations on making final recommendation and conclusions, the roll up of the comments made by participants tended to be consistent in each focus group so as to constitute valid recommendations under nine major subject headings.

The meetings' facilitators clarified that the focus group would review the *Canadian Human Rights Act* and not the *Charter of Rights and Freedoms* and explained some of the differences between the two human rights instruments. It was also noted that both the constitutionally protected Aboriginal and Treaty Rights and the UN *Declaration on the Rights of Indigenous Peoples* form an important context to the understanding the application of the *CHRA* to Aboriginal peoples. Both the Constitution and the UN Declaration were raised as important questions about how the *CHRA* would be interpreted and applied in various Aboriginal contexts both on and off-reserve. The following recommendations represent a roll-up of the five focus group discussions held nationally in 2010 on the upcoming application of the *CHRA*.

Recommendation 1: The Meaning of Customary Law

- Focus group participants consistently expressed that they do not know what their customary laws and clan systems are within their nations. First Nations Languages are important to this understanding of what customary laws are.
- Others feel that customary laws exist in the teaching of the Elders and in the oral traditions. Kinship is an aspect of the clan system. Some felt that not all customary practices should be considered laws. For example, non-interference was cited as a traditional custom. How might this customary practice be reconciled with laws?
- There is also a need to know what customary law and legal traditions are and how have they merged? There was also a serious concern expressed about outsiders being able to understand what customary law means.

Therefore, education on what customary laws are and how they are to be applied is needed within First Nations communities. Access to fiscal resources are needed to understand and work through the meaning and application of customary laws by way of a community consultation process with scholars, language professionals, women and Elders. There must be research projects focused on Traditional Governance Systems and how these compare and are reconciled with Western systems.

Recommendation 2: First Nations Systems

- Focus Groups stated that First Nations need their own processes and procedures for addressing human rights complaints.
- Other participants felt that there was not enough training and awareness about the complaints process.
- Some participants expressed that they might be more apt to bring a compliant forward if they were certain that their matters were to be addressed independently and promptly with the assurance that there will be no retaliation or retribution. Some stated that they were unsure whether the process should involve Chief and Council.

Therefore, it is recommended that First Nations be encouraged to develop their own complaints and grievance processes as well as, conflict resolution and tribunals to decide on matters of *CHRA* individual human rights complaints. It is also recommended that existing and new policies be reviewed to ensure compliance.

Recommendation 3: Legal Resources

- While there was a need for more information on the *CHRA* and CHRT in every session, there was also a grave need for information on the Canada Labour Code related to employment-related matters, in general.
- There was an overall need for lawyers, legal knowledge and resources in First Nations and Aboriginal communities, including the expressed need for mediators and alternate dispute personnel and resources.
- There is also a need for written resources on legal matters.

Therefore, funding for legal resources and personnel must be made available to First Nations in every capacity: lawyers, mediators, alternate dispute personnel.

Recommendation 4: Membership

- What constitutes membership was also expressed as a concern for discussion in the focus groups. Membership varies from one nation to another.
- Some expressed concern that blood quantum is a prevalent factor for membership and others expressed that connection and spirituality for membership are important.

- There was some discussion on the understanding of the McIvor decision where there one generation is accepted as having Indian status identity and the next is not under the *Indian Act*. There was a need for assistance in dealing with the section 6(1) and 6(2) issue, the unrecognized paternity issue and how this will affect funding.

Therefore, membership is an issue which must be seriously analyzed where human rights complaints come forward. Effort must be made and funding must be made available to help determine these issues in a fair and equitable manner.

Recommendation 5: *CHRA* and CHRT Application Awareness

- There was some discussion on the *CHRA* and how it applies. Some felt that community promotion and education awareness is needed on the *CHRA*.

- Questions asked were: How long the applications take to process? Are there Aboriginal researchers on the CHRT? What are the procedures once a formal complaint is made?

Therefore, education and awareness must take place in First Nations communities on the procedural aspects of the *CHRA* and the CHRT along with a cultural sensitivity and awareness component to these activities. There need to be a Human Right Navigator position in place in communities, as well as, *CHRA* and CHRT Communication Strategies.

Recommendation 6: Women's Needs, Employment and Services

- First Nations have special needs both on and off-reserve. It was expressed that women are often cast aside without resources.

- Others expressed that certain issues are not just women issues.

- Women feel they need an outside resource person or complaints person, such as: an Ombudsmen or mediator. Some processes are in place but often they are "ad hoc."

- There is favouritism, nepotism and unfairness in employment, unfair job practices, 'boys clubs,' dual role playing and a concentration of power on Councils.

- There is a need for lawyers, mediators, ADR.

- Many focus groups expressed the need for particular outreach to women in this *CHRA* awareness process, by way of: information sessions, guest speakers, notices, web-site promotion, networking, etc.

- More Aboriginal women are needed in First Nations Governments, in employment and at the *CHRA* and the CHRT.

Therefore, women should be the focus of *CHRA* and CHRT awareness campaigns. Women should also take part in these initiatives. Aboriginal women must be part of the *CHRA* and CHRT. Resources, funding and capacity development are needed to ensure that sound administrative processes and practices, as well as, mediation and ADR are put into place to ensure compliance so that equal rights exist in employment and services for everyone.

Recommendation 7: Disability, Housing Needs and Substance Abuse Treatment Issues

- Focus group members expressed the need to ready their communities on disability, housing and substance abuse treatment issues.
- There are substance treatment issues and housing policy concerns which need to be addressed at the community level, which affect employment participation and stability.
- People with special needs require support, including front-line services that meet their needs.
- People also have special housing needs and sometimes there is no support for them because they are Native or living with a non-Native spouse.

Therefore, it is recommended that disability, housing and treatment issues be a focus of targeted awareness.

Recommendation 8: Policy Resources and Sampling Templates

- Focus Groups stated that there is a need to develop more of a policy-driven approach to any *CHRA* and CHRT awareness campaign.
- There is a strong need to assist communities in identifying policy resource documents and instructions on how they should be followed.
- Due to the fact that First Nations traditional ways of dealing with issues are in jeopardy, policy resources are needed now more than ever.

Therefore, policy resources and sample documents should be made available to First Nations as part of the *CHRA* and CHRT awareness campaign.

Recommendation 9: Well-being and the *CHRA*

- Some Focus Group participants expressed concern for lack of preparation for the upcoming legislation and the need for formal processes to provide help to the communities in many other areas, related to health and well-being.

Therefore, further preparation is need to instruct all players, managers, community members, women, men children on the implementation of the *CHRA* and CHRT. Health and well-being are important parts of this; the *CHRA* awareness must be an integral component of every service delivered to and in participation with First Nation and Aboriginal communities.

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Report of the Congress of Aboriginal Peoples

1. INTRODUCTION

For over thirty years, Aboriginal peoples in Canada were the only people in Canada who did not have full access to the complaint mechanism in the *Canadian Human Rights Act* ("*CHRA*").[65] Passed in 1977, Section 67 of the *CHRA* prevented certain types of discrimination complaints against the federal government and band councils arising from the *Indian Act*[66] from being brought before the Canadian Human Rights Commission (the "Commission") and the Canadian Human Rights Tribunal (the "Tribunal"). In June 2008, the federal government finally repealed Section 67 of the *CHRA*, allowing Aboriginal peoples full access to the complaint mechanism under the *CHRA* to address discrimination. However, a three-year transition period was introduced with the repeal suspending full application of the *CHRA* to *Indian Act* band councils until June 2011.

The repeal legislation also imposed a requirement on the Government of Canada to study the needs of Aboriginal communities and organizations arising from the repeal of Section 67 ("the operational review provision").[67] The findings of that study are to be presented in a report to the Parliament and Senate no later than June 18, 2011 (the "Report").[68]

To CAP and its constituents, the full impact of the repeal of Section 67 cannot be appreciated without considering a number of contextual factors. These include the large (and growing) urban/off-reserve Aboriginal population, the unique needs and circumstances of the off-reserve Aboriginal population as recognized by the Supreme Court of Canada in the *Corbière v. Canada (Minister of Indian and Northern Affairs)* case,[69] and the impact the *Indian Act* has historically had, *and continues to have*, on the off-reserve, status and non-status Indian population. A consideration of these factors leads to the inescapable conclusion that **the repeal of Section 67 does not simply impact the on-reserve population. Although not living on reserve, off-reserve individuals are very much affected by decisions of *Indian Act* band councils and the Government of Canada / Indian and Northern Affairs Canada, including decisions with respect to Indian registration and band membership, voting rights, and eligibility for various programs and services.**

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65 *Canadian Human Rights Act*, R.S.C. 1985, c. H-6 ("CHRA").

66 *Indian Act*, R.S.C. 1985, c. I-5 ("*Indian Act*")

67 *An Act to Amend the Canadian Human Rights Act*, 2nd Sess., 39th Parl., 2008, c. 30 ("Bill C-21"), s.2(1).

68 *Ibid.*, s.2(2).

69 *Corbière v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203 ("*Corbière*").

Other contextual factors that inform the discussion and recommendations in this report are Canada's commitment to a new relationship with Aboriginal peoples following the repeal of Section 67 and its endorsement of the United Nations' Declaration on the Rights of Indigenous Peoples, and the Honour of the Crown. **All of these contextual factors are reviewed in Appendix A to CAP's report.**

A description of the organizational make-up of CAP, its objectives, affiliates and accomplishments are set out in **Appendix B to CAP's report.**

2. METHODOLOGY

With the end goal of providing a discussion and recommendations to Canada for its Report, the Congress of Aboriginal Peoples ("CAP") undertook a multi-stage process:

1) In 2009/2010, we conducted a needs assessment to determine the impacts of repealing Section 67 of the *CHRA* on off-reserve, non-status and status Indians. The methodology employed for the needs assessment involved information and dialogue sessions carried out by our affiliate organizations. The purpose was to educate and inform our constituents, as well as gather opinions and suggestions to be included in this final needs assessment report. We researched and produced a workbook and questionnaire in both French and English, which were used in the dialogue and information sessions and posted on the CAP website. In total, 18 dialogue and information sessions were held across Canada with approximately 450 people in attendance, which are incorporated in this report and in CAP's main report entitled *Final Report on Needs Assessment Study: Post Repeal of Section 67 of the Canadian Human Rights Act.*[70]

2) Following the dialogue sessions, CAP prepared a report summarizing the main points raised during the sessions as well as key recommendations for the implementation of the *CHRA* to meet the needs and interests of CAP's constituency.[71]

3) Finally, CAP has authored this report, summarizing the main points and recommendations identified in the dialogue sessions and incorporating these into a larger discussion taking into account the contextual factors referenced above and reviewed in Appendix A to this report. From this arises 44 recommendations

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[70] Congress of Aboriginal Peoples, *Needs Assessment Study: Post Repeal of Section 67 of the Canadian Human Rights Act – Workbook on Human Rights* (November 20, 2009) ("*Needs Assessment Guide*"), accessible at http://www.abo-peoples.org/images/pdf/resources/needs%20assessment%20study%20workbook%20english.pdf.

[71] Congress of Aboriginal Peoples, *Final Report on Needs Assessment Study: Post Repeal of Section 67 of the Canadian Human Rights Act* (March 31, 2010) ("*Final Report on Needs Assessment*"), accessible at http://www.abo-peoples.org/images/pdf/resources/cap%20final%20report%20on%20section%2067%20needs%20assessment%20study.pdf.

aimed at meeting the human rights needs of the off-reserve, non-status and status Indians set out herein.

3. THE SCOPE OF CANADA'S OPERATIONAL REVIEW AND REPORT TO PARLIAMENT

The operational review requirement for Canada to undertake a study of needs and table a report to Parliament is set out in Section 4 of *An Act to Amend the Canadian Human Rights Act*, S.C. 2008, c. 30:

> 4. The Government of Canada, together with the appropriate organizations representing the First Nations peoples of Canada, shall, within the period referred to in section 3, undertake a study to identify the extent of the preparation, capacity and fiscal and human resources that will be required in order for First Nations communities and organizations to comply with the Canadian Human Rights Act. The Government of Canada shall report to both Houses of Parliament on the findings of that study before the expiration of the period referred to in section 3. [emphasis added]

On a plain language reading of the provision, the language is focused on undertaking a study to identify the needs of First Nations communities to comply with the *CHRA*. It therefore appears that the focus of the Section 4 study is the needs of *Indian Act* band councils as respondents. While it is obviously important to study the needs of *Indian Act* band councils to ensure that they are prepared to respect and implement the *CHRA*, the Government's report cannot be one sided. The needs of potential complainants, which is what CAP's constituency stand to be, cannot be ignored. The repeal of Section 67 affects individual Indian people just as much, if not more, than an *Indian Act* band council. After all, band councils benefitted from having discrimination complaints shielded by Section 67 (although not to same extent as Canada), while Indian people were deprived of human rights redress for over 30 years.

It is CAP's position that the Government of Canada's Report to Parliament and the Senate must be balanced. It must focus on both the needs of potential respondents, and potential complainants. This is mandated by the new relationship between Canada and Aboriginal peoples that Canada spoke of when it repealed Section 67 and when it endorsed the UN Declaration on the Rights of Indigenous Peoples. It is also mandated by the Honour of the Crown and the need for Canada to redress the historic and continuing discrimination caused by the *Indian Act* and government policy towards Aboriginal people, including off-reserve, status and non-status Indians.

Furthermore, as has been recognized by the courts, remedial legislation, such as the *CHRA*, has to be read in broad fashion, taking in to consideration the purpose of the Act as a whole and the surrounding context. In *Canadian National Railway v. Canada (Human Rights Commission)*, Dickson C.J., acknowledged the unique purpose of human

rights legislation and held that remedial statutes like the *CHRA* are to be given "such fair, large and liberal interpretations as will best ensure that their objects are attained."[72] Therefore, the Government of Canada's Report to the House of Commons and the Senate must consider both sides of the equation – both the needs of *Indian Act* band councils and the needs of individual Indian people.

Similarly, another observation to be made about Section 4 is that the stated focus is on capacity, fiscal and human resources needs. These are not all the possible needs that Aboriginal respondents or Aboriginal complainants will have in response to the repeal of Section 67. From the perspective of Aboriginal complainants, particularly the off-reserve, status and non-status Indian population, there are also needs to see policy, legislative and systemic reforms within the current human rights redress system. CAP sees this report as an opportunity to raise and discuss these types of needs in addition to capacity, fiscal and human resource needs.

Finally, CAP recognizes that there are several players involved in sustaining a society that respects Aboriginal peoples' individual and collective rights. As a result, the recommendations in this report are not only focused on Canada / Parliament, its departments and employees, but the other players, including the Canadian Human Rights Commission, and provincial and territorial human rights commissions under provincial / territorial jurisdiction.

4. DISCUSSIONS OF NEEDS AND CONCERNS RAISED BY OUR CONSTITUENTS AND RECOMMENDATIONS

The needs and concerns raised by participants at the dialogue sessions generally fell within six key areas. These are:

1) Education and awareness of human rights;
2) Cultural competency and sensitivity of those involved in the system;
3) Access to the system;
4) Strengthening protections in the *CHRA* for Aboriginal complainants;
5) Canada's accountability for promoting and respecting the human rights of Aboriginal peoples; and
6) The larger picture of Aboriginal equality / human rights.

For this reason, the discussion below, and the recommendations that spring from these, are organized under corresponding headings. Each subsection begins by summarizing the needs heard at the dialogue sessions, cross-referencing with footnotes where these needs were raised in the *Final Report of Needs Assessment*. These needs are then

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72 *Canadian National Railway v. Canada (Human Rights Commission)*, [1987] 1 S.C.R. 114 (S.C.C.), at p. 1134.

incorporated into a discussion on ways the needs can be addressed with recommendations provided. **Recommendations appear in the shaded boxes.**

4.1. Education and awareness of human rights

By far, the need that was voiced most often by participants at the dialogue sessions was for greater information on the *CHRA*.[73] Our needs assessment clearly indicated that our constituents' level of awareness of the *CHRA*, the Commission and Tribunal, as well as provincial and territorial human rights systems, is low.

Generally, participants felt that more needs to be done to raise greater awareness within the Aboriginal population about the repeal of Section 67 and human rights systems. Having additional education and information sessions was a reoccurring suggestion at every dialogue session, particularly during the time frame when the repeal of Section 67 will be taking full effect. In regard to holding such sessions, we heard suggestions for organizers to be conscious of language and literacy needs of Aboriginal participants and the need for such sessions to be well-publicized.[74]

Some participants pointed out that, in addition to educating Aboriginal individuals about their rights under the *CHRA*, it will be just as crucial to educate *Indian Act* band councils about their obligations under the *CHRA*.[75] It was suggested that *Indian Act* band councils, in particular, should be educated about their obligations to their off-reserve members[76] and the prohibition against retaliation under the *CHRA*.[77]

Human rights education for Aboriginal youth throughout the school system, both on and off reserve, was identified as a further way to ensure that the Aboriginal population gain greater awareness of human right systems.[78]

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73 See *Final Report on Needs Assessment*, *supra* note 7 at p. 6, BC United Native Nations, 1st bullet; p. 7, Alberta session summary, 3rd and 4th bullets; p. 10, Manitoba Indigenous Peoples Confederacy, 18th bullet; p. 11, Ontario Coalition of Aboriginal Peoples, 5th bullet; p. 12, Native Alliance of Quebec, 8th bullet; p. 13, New Brunswick Aboriginal Peoples Council, 4th bullet; p. 14-15, Native Council of Nova Scotia, 17th, 18th and 20th bullets; p. 17-18, Native Council of Prince Edward Island, 15th bullet.

74 *Final Report on Needs Assessment*, *supra*, note 7 at p. 8-9, Aboriginal Affairs Coalition of Saskatchewan, 16th bullet; and p. 15-16, Native Council of Nova Scotia, 20th and 31st bullets.

75 *Final Report on Needs Assessment*, *ibid.*, at p. 7, Alberta session, 13th bullet.

76 *Final Report on Needs Assessment*, *ibid.*, at p. 7, Alberta session, 6th bullet.

77 *Final Report on Needs Assessment*, *ibid.*, at p. 7, Alberta session, 14th bullet.

78 *Final Report on Needs Assessment*, *ibid.*, at p. 7-8, Alberta session, 18th bullet; p. 11, Ontario Coalition of Aboriginal People, 7th bullet; p. 13, New Brunswick Aboriginal Peoples Council, 6th bullet.

1. The Commission should coordinate with CAP and its affiliates to provide more awareness sessions on the repeal of Section 67 and the *CHRA* for the three next fiscal years (2011-2013).[79]

2. Greater cooperation is needed between the Commission and CAP to ensure CAP constituents gain greater awareness of their legal options to address discrimination.[80]

Participants at the dialogue sessions also identified a number of specific topics where further information and education for Aboriginal peoples is required:

1) The process and procedure for filing a human rights complaint;[81]
2) The role and function of the Commission;[82]
3) The ability to file complaint against *Indian Act* band councils and the areas in which a complaint can be brought;[83]
4) The ability to challenge *Indian Act* and band council election rules;[84]
5) The ability to challenge the *Indian Act* registration ("status") provisions and membership rules as well as band membership codes and by-laws;[85]
6) The ability to challenge government departments who service Aboriginal peoples (e.g., INAC, Health Canada, HRSDC, etc.);[86]
7) Human rights protections in the area of employment;[87]

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79 Recommendation 1 in *Final Report on Needs Assessment, ibid.*, at p. 19. The original recommendation set the timeline for education for 2010-2011. Since the earliest Parliament may be considering this report is mid-June 2011, CAP feels that is reasonable to increase the education period to a period in which it will be feasible to provide the needed education.

80 This is based on recommendation 6 in *Final Report on Needs Assessment, ibid.*, at p. 20.

81 *Final Report on Needs Assessment, ibid.*, at p. 6, BC United Native Nations Society, 16th bullets; p. 8, Aboriginal Affairs Coalition of Saskatchewan, 2nd bullet; p. 10, Manitoba Indigenous Peoples Confederacy, 7th and 18th bullets; and p. 13, New Brunswick Aboriginal Peoples Council, 4th bullet.

82 *Final Report on Needs Assessment, ibid.*, at p. 7, Alberta session, 3rd bullet; and p. 13, New Brunswick Aboriginal Peoples Council, 10th bullet.

83 *Final Report on Needs Assessment, ibid.*, at p. 6, BC United Native Nations Society, 2nd bullet.

84 *Final Report on Needs Assessment, ibid.*, at p. 6, BC United Native Nations Society, 15th bullet.

85 *Final Report on Needs Assessment, ibid.*, at p. 6, BC United Native Nations Society, 5th and 10th bullets; p. 14-15, Native Council of Nova Scotia, 9th bullet; and p. 7, Alberta session, 1st bullet.

86 This is based on *Final Report on Needs Assessment, ibid.*, at p. 6, BC United Native Nations Society, 13th bullet.

8) Human rights protections in the area of housing;[88]
9) Information on human rights issues as they effect urban Aboriginals;[89]
10) Information on human rights issues as they effect Aboriginal people in rural and remote areas;[90]
11) How the new interpretive provision in the *CHRA* will operate;[91] and
12) How Aboriginal and Treaty rights will be affected by the *CHRA*.[92]

3. The CHRC should work closely with CAP so that both organizations can coordinate education / workshops on specific issues of discrimination, such as employment, housing and education for Aboriginal peoples. [93]

In addition to in-person information sessions, participants also identified the need for information on the repeal of Section 67 to be accessible through other means such as newsletters, plain language guides, television and newspapers, and the web.[94]

4. The Commission should develop more plain language tools in English, French and Aboriginal languages to increase awareness of the *CHRA*, Commission and Tribunal.[95]

A final area that participants identified involved the need for further education and awareness with respect to the role and jurisdiction of provincial and territorial human rights commissions vis-à-vis Aboriginal peoples.[96] Many were not aware that in several situations, provincial and territorial governments will have jurisdiction over a human

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87 *Final Report on Needs Assessment*, *ibid.*, at p. 7, Alberta Session, 17th bullet; p. 10, Manitoba Indigenous Peoples Confederacy, 11th bullet; p. 11, Ontario Coalition of Aboriginal Peoples, 6th bullet.

88 *Final Report on Needs Assessment*, *ibid.*, at p. 7, Alberta Session, 17th bullet.

89 *Final Report on Needs Assessment*, *ibid.*, at p. 6, BC United Native Nations Society, 15th bullet.

90 *Final Report on Needs Assessment*, *ibid.*, at p. 8-9, Aboriginal Affairs Coalition of Saskatchewan, 13th bullet.

91 *Final Report on Needs Assessment*, *ibid.*, at p. 11, Ontario Coalition of Aboriginal Peoples, 8th bullet; and p. 13-14, New Brunswick Aboriginal Peoples Council, 16th bullet.

92 This is based on *Final Report on Needs Assessment*, *ibid.*, at p. 10, Manitoba Indigenous Peoples Confederacy, 16th bullet.

93 This is based on Recommendation 7 of *Final Report on Needs Assessment*, *ibid.*, at p. 20.

94 *Final Report on Needs Assessment*, *ibid.*, at p. 6, BC United Native Nations Society, 17th bullet.

95 Recommendation 8 *Final Report on Needs Assessment*, *ibid.*, at p. 21.

96 *Final Report on Needs Assessment*, *ibid.*, at p. 11, Ontario Coalition of Aboriginal Peoples, 1st bullet.

rights complaint involving Aboriginal people.[97] This speaks not only to the need for further education on jurisdictional questions, but the need for provincial and territorial human rights commissions to undertake greater outreach to Aboriginal peoples.

5. The CHRC and each provincial and territorial human rights commission need to coordinate efforts to ensure that jurisdictional issues are addressed immediately at the complaint intake level and referred to the appropriate body. These bodies should ensure intake staff is properly trained in jurisdictional issues as they relate to Aboriginal peoples.[98]

6. Provincial and territorial commissions need to provide greater outreach to Aboriginal communities, organizations and peoples to provide information about the services they can provide and the areas that fall under their jurisdiction.[99]

7. In general, greater cooperation / coordination is needed between the various provincial and territorial commissions and CAP to ensure our constituents gain greater awareness of their legal options to address discrimination.[100]

4.2. Cultural competency of those involved in the system

Dialogue participants raised various concerns about lack of adequate Aboriginal representation within the staff of the Commission and Tribunal and questioned whether non-Aboriginal staff possessed sufficient cultural competency about Aboriginal peoples, our histories, customs and traditions.[101] This concern was heightened in light of the fact that the new interpretive clause in the *CHRA* now requires the balancing of individual and collective rights and providing due regard to Aboriginal legal traditions and customary laws.[102] Similar concerns were voiced about the staff of the various provincial and territorial human rights commissions under provincial / territorial jurisdiction.

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97 *Final Report on Needs Assessment, ibid.*, at p. 12, Native Alliance of Quebec, 2nd bullet; p. 14, Native Council of Nova Scotia, 4th bullet; p. 17, and Native Council of Prince Edward Island, 3rd bullet.

98 This is based on Recommendation 3 of *Final Report on Needs Assessment, ibid.*, at p. 19.

99 This is based on the needs articulated *supra* at notes 32-33.

100 This is based on Recommendation 6 of *Final Report on Needs Assessment, supra* note 7, at p. 20.

101 *Final Report on Needs Assessment, ibid.*, at p. 8, Alberta session, 23rd bullet; p. 8-9, Aboriginal Affairs Coalition of Saskatchewan, 6th and 9th bullets; and p. 10, Manitoba Indigenous Peoples' Confederacy, 2nd bullet.

102 *Final Report on Needs Assessment, ibid.*, at p. 10, Manitoba Indigenous Peoples' Confederacy, 8th bullet.

Constituents suggested that in order to address all of the above concerns both the Canadian and provincial and territorial human rights commissions should take positive steps to ensure that Aboriginal peoples are adequately represented at the various levels of their respective commissions and tribunals;[103] and also ensure that non-Aboriginal staff receive cultural competency training about Aboriginal peoples[104].

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[103] *Final Report on Needs Assessment*, *ibid.*, at p. 7, Alberta session, 4th, 8th and 22nd bullets; p. 8-9, Aboriginal Affairs Coalition of Saskatchewan, 6th, 8th and 9th bullets; and p. 10, Manitoba's Indigenous Peoples Confederacy, 3rd bullet.

[104] *Final Report on Needs Assessment*, *ibid.*, at p. 8, Alberta session, 23rd bullet; p. 8-9, Aboriginal Affairs Coalition of Saskatchewan, 6th and 9th bullets; and p. 10, Manitoba Indigenous Peoples' Confederacy, 2nd bullet.

Canadian Human Rights Commission

8. Implement training for Commission staff, particularly intake officers and investigators to ensure competency in the seventy-three nations of Aboriginal peoples and their culture, laws, traditions and views.[105]

9. Actively recruit Aboriginal people for a variety of Commission positions, including intake officers, administrative staff, investigators, and supervisory positions. Review selection criteria for such positions to ensure they do not create undue barriers to the appointment of Aboriginal peoples.[106]

Canadian Human Rights Tribunal

10. Include knowledge of Aboriginal issues as a mandatory selection criteria for candidates applying to sit as Tribunal members. [107]

11. Actively recruit Aboriginal lawyers to sit as Tribunal members. In this regard, review selection criteria to ensure that it does not create undue barriers for such appointments.[108]

Provincial and Territorial Commissions

12. Implement training for staff, particularly intake officers and investigators to ensure competency in dealing with Aboriginal peoples and our cultures, laws, traditions and views.[109]

13. Actively recruit Aboriginal people for variety of Commission positions, including intake officers, administrative staff, investigators, and supervisory positions. Review selection criteria for such positions to ensure it does not create undue barriers to the appointment of Aboriginal peoples.[110]

4.3. <u>Access to human rights redress systems</u>

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105 Based on Recommendation 13 of *Final Report on Needs Assessment, ibid.*, at p. 21.

106 Based on Recommendations 13 and 15 of *Final Report on Needs Assessment, ibid.*, at p. 21-22.

107 Based on needs articulated *supra* at note 37 and 38.

108 Based on needs articulated *supra* at note 37 and 38.

109 Based on Recommendation 2 of *Final Report on Needs Assessment, supra,* note 7., at p. 19.

110 Based on Recommendation 3 of *Final Report on Needs Assessment, ibid.*, at p. 19.

We heard a number of concerns at our dialogue sessions about potential barriers preventing Aboriginal claimants from bringing complaints to the Commission. According to Article 40 the UN Declaration on the Right of Indigenous Peoples, States have an obligation to minimize such barriers:

> **Article 40**
> Indigenous peoples have the right to access to and prompt decision through just and fair procedures for the resolution of conflicts and disputes with States or other parties, as well as to effective remedies for all infringements of their individual or collective rights . . ..[111]

A significant barrier identified was the lack of financial resources to allow Aboriginal claimants to hire legal representation to bring a complaint forward. Although the Commission, as an administrative tribunal, is designed to be a more accessible form of redress, it is still the case that in proceeding with a complaint, most Aboriginal complainants will want some legal advice, especially if taking a complaint all the way to the Tribunal.[112] In addition, Aboriginal complainants may lack the education to assemble a complaint that will be accepted by the Commission.[113]

Self-represented complainants are generally at a disadvantage in legal proceedings. Indeed, it was pointed out by dialogue participants that the federal government and band councils generally have the financial means to hire lawyers to defend their claims. Aboriginal claimants will certainly be at a disadvantage if they cannot access legal advice and representation.[114] The power imbalance immediately weighs in favour of the federal government and band councils. Lack of legal assistance will discourage Aboriginal people from filing complaints.[115]

There are several options for ensuing that Aboriginal complainants are provided adequate legal assistance. This could take the form of legal aid funding,[116] creating an *amicus* position before the Commission and Tribunal for Aboriginal complainants,[117] or

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111 *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res. 61/295, UN GAOR, 2007 ("UNDRIP"), Article 40. The full text of the Declaration is available at: http://www.un.org/esa/socdev/unpfii/en/drip.html.

112 *Final Report on Needs Assessment*, *supra*, note 7., at p. 6, BC United Native Nations Society, 3rd bullet.

113 *Final Report on Needs Assessment*, *ibid.*, at p. 7-8, Alberta session, 21st bullet.

114 *Final Report on Needs Assessment*, *ibid.*, at p. 7, Alberta session, 2nd bullet; p. 8-9, Aboriginal Affairs Coalition of Saskatchewan, 7th bullet; p. 10, and Manitoba Indigenous Peoples Confederacy, 1st bullet; p. 14-15.

115 *Final Report on Needs Assessment*, *ibid.*, at p. 8, Alberta session, 20th bullet.

116 Based on Recommendation 10 of *Final Report on Needs Assessment*, *ibid.*, at p. 21.

117 *Ibid.*

exploring the viability of creating an Ombudsman's Office.[118] This latter option presents the possibility of having national, regional, or provincial offices, where the Ombudsman could play a role facilitating dialogue and resolution not only between the complainant and the Commission, but also between the complainant and the federal government and/or band councils.

14. The Government of Canada, in consultation with the Commission, should establish a Legal Aid Fund for Aboriginal complainants to enable them to be represented by legal counsel before the Tribunal.[119]

15. Alternatively, the Commission and Tribunal should establish an *amicus* specifically for all Aboriginal complainants appearing before the Commission and Tribunal. It will be incumbent on the Government of Canada to appropriately fund the creation of such a position.[120]

16. The concept of an Ombudsman process should be examined and introduced to provide oversight and advocacy for the human rights of all Aboriginal peoples.[121]

17. Research is required to determine the best alternative dispute resolution process for Aboriginal peoples as we require a separate system that meets our diverse cultural identities.[122]

18. In the interim, the federal government should significantly invest in the Commission to improve its dispute resolution process to reflect the values, customs and traditions of Aboriginal peoples.[123]

The Commission promotes the use of an internal dispute mechanism by *Indian Act* band councils to resolve complaints.[124] As long as the band council's dispute resolution rules meet certain minimum requirements, the Commission will hold a complaint in abeyance until such time as the complainant has exhausted the remedies under the band council's redress system. While CAP supports the use of such internal redress mechanisms, they should not be structured in ways that are systemically biased against off-reserve band

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118 See *Final Report on Needs Assessment, ibid.*, at p. 8, Alberta session, 11th bullet.

119 Based on Recommendation 10 of *Final Report on Needs Assessment, ibid.*, at p. 21.

120 *Ibid.*

121 Based on Recommendation 17, of *Final Report on Needs Assessment, ibid.*, at p. 22.

122 Based on Recommendation 13 of *Final Report on Needs Assessment, ibid.*, at p. 21.

123 *Ibid.*

124 CHRA, *supra*, note 1 at s.41.

members. There should also be a minimum requirement that complaints be heard and decided within a reasonable time period.[125]

19. The Commission's minimum standards for approving *Indian Act* band council's internal dispute resolution procedures should provide specific guidance on how these must be designed to prevent systemic bias to the complaints of off-reserve members. The Commission should also require that such complaints be heard and decided within a reasonable period of time. The Commission should consult with CAP, as the national organization that represents off-reserve people, when developing these standards.

A final concern that we heard from dialogue participants related to the time it takes the Commission and Tribunal to resolve a complaint. Participants noted that the lengthy process in resolving a complaint discourages Aboriginal peoples from engaging in the complaints process.[126]

20. The Government of Canada should ensure that the Commission and Tribunal are adequately funded in a timely fashion, such that sufficient staff can be employed to handle the volume of complaints that will be received once Section 67 is fully repealed.

4.4. Strengthening protections in the *CHRA* for Aboriginal complainants

As part of its dialogue sessions, CAP sought to raise awareness among participants not only about the repeal of Section 67, but more generally about the *CHRA*: the listed grounds of discrimination, the protected areas of discrimination, when discrimination can be justified, the new non-derogation and interpretive provisions introduced by the repeal legislation, and the process for making a complaint. During this part of the sessions, participants identified many sections of the *CHRA* where the rights of Aboriginal people, in particular off-reserve, status and non-status Indians, could be strengthened. In this subsection, we recommend many ways that the protections provided under the *CHRA* can be improved to meet the needs of our constituents.

When the *CHRA* was enacted in 1977, the focus was decidedly not on ensuring that the human rights of Aboriginal peoples were effectively protected. In fact, the intent, or at

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[125] While these concerns were not specifically voiced during the dialogue sessions, as time constraints prevented an exhaustive review of the CHRA process, CAP constituents have an obvious interest in dispute resolution procedures being fair and representative,

[126] *Final Report on Needs Assessment, supra,* note 7., at p. 7-8, Alberta session, 20th bullet; and p. 8-9, Aboriginal Affairs Coalition of Saskatchewan, 19th bullet.

least the effect, was the opposite: to prevent fulsome protection of Aboriginal peoples' human rights, as Section 67 remained a painful reminder for over 30 years. By repealing Section 67, Canada committed, both by words and actions, to a new relationship with Aboriginal peoples. It is CAP's contention that repealing Section 67 was only the start of that commitment; not the entire fulfillment of that commitment.

A positive way for Parliament to ensure that a strong human rights system is in place for Aboriginal Peoples – one that truly recognizes our histories and needs and circumstances – may be through passing a human rights act geared specifically to Aboriginal peoples.

21. Parliament should study the feasibility, in consultation with Aboriginal peoples and the Canadian Human Rights Commission, of establishing human rights legislation specifically focused on, administered, and adjudicated by Aboriginal peoples.[127]

However, until a specific human rights act is created for Aboriginal peoples and the *CHRA* remains a key vehicle for the protection of Aboriginal peoples human rights in Canada, more work needs to be done to ensure that the particular discrimination issues Aboriginal peoples face are adequately addressed by the *CHRA*.

4.4.1. Mechanisms for strengthening the CHRA

There are two ways in which clearer and stronger protection of Aboriginal peoples' human rights, in particular the human rights of off-reserve, status and non-status Indian population, can be implemented.

4.4.1.1. By the CHRC's exercise of its guideline-making power under Section 27(2) the CHRA

The Commission has the power to make guidelines under Section 27(2) of the *CHRA*, which is binding both on the Commission and on the Tribunal pursuant to Section 27(3):

> 27(2) The Commission may, on application or on its own initiative, by order, issue a guideline setting out the extent to which and the manner in which, in the opinion of the Commission, any provision of this Act applies in a class of cases described in the guidelines.
>
> (3) A guideline issued under subsection (2) is, until it is revoked or modified, binding on the Commission and any member or panel assigned under subsection 49(2) with respect

127 Based on Recommendation 13 of *Final Report on Needs Assessment, ibid.*, at p. 21.

> to the resolution of a complaint under Part III regarding a case falling within the description contained in the guideline.

The validity, utility, and limits of the Commission's Section 27(2) guideline-making power were thoroughly reviewed by the Supreme Court of Canada in *Bell Canada v. C.T.E.A.*[128] In that case, the Supreme Court roundly rejected Bell's argument that guidelines issued by the Commission compromised either the independence or impartiality of the Tribunal. On the contrary, the Court commented favourably on the utility of guidelines to achieve the objectives of the *CHRA*:

> The Tribunal is part of a legislative scheme for identifying and remedying discrimination. As such, the larger purpose behind its adjudication is to ensure that governmental policy on discrimination is implemented. It is crucial, for this larger purpose, that any ambiguities in the Act be interpreted by the Tribunal in a manner that furthers, rather than frustrates, the Act's objectives. ... The Act therefore evinces a legislative intent, not simply to establish a Tribunal that functions by means of a quasi-judicial process, but also to limit the interpretive powers of the Tribunal in order to ensure that the legislation is interpreted in a non-discriminatory way.[129] [emphasis added].

According to the Court, the purpose of guidelines is to "ad[d] precision to the Act, without in any way trumping or overriding the Act itself".[130] Guidelines enable the Commission to add clarifying supplements, where necessary, to the leanly articulated principles in the Act.[131] They are also an efficient and clear way to provide the public with a sense of their rights and obligations under the Act, where the Act is ambiguous, and where guidance from the Tribunal itself through decision would take much time.[132]

It is CAP's position that having the Commission issue guidelines under Section 27(2) to clarify that a particular protection is available for Aboriginal peoples under the *CHRA* – *where that protection is supported by a reasonable interpretation of the existing provisions of the CHRA* – is a viable mechanism for strengthening the *CHRA* for Aboriginal claimants. The guidelines should be accessible on the Commission's website and be promoted on the Commission's National Aboriginal Initiative webpage and its publications webpage. The areas in which CAP believes the *CHRA* could be strengthened through the issuance of clear guidelines by the Commission are explored further below.

4.4.1.2. By legislative amendment to the CHRA by Parliament

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128 *01; 358211394Bell Canada v. C.T.E.A.*, 2003 SCC 36 ("Bell").

129 *Ibid.*, at para. 26

130 *Ibid.*, at para. 48.

131 See *C.U.P.E. v. Canadian Airlines International Ltd.*, [2006] 1 S.C.R. 3, at para. 27.

132 *Bell*, *supra*, note 68 at para. 43.

There are situations where strengthening the protections for Aboriginal peoples within the *CHRA* will require legislative amendment to the Act by Parliament. This will arise in cases where the protection required goes beyond what can be reasonably interpreted from the existing provisions of the *CHRA*. As well, even in some cases where the Commission has the power to pass a guideline, it may be appropriate for Parliament to consider legislative amendment in order to send a strong and clear message about the importance of the protection.

In order for Parliament to pass additional amendments to the *CHRA*, there has to be the political will to do so. The commitment to a new relationship with Aboriginal peoples announced by Canada following both the repeal of Section 67 and the endorsement of the UNDRIP should serve as motivating considerations.

Furthermore, in certain cases the omission of a human rights protection from human rights legislation can rise to the level of Section 15(1) equality violation under the *Canadian Charter of Rights and Freedoms*, requiring the government to take action. In *Vriend v. Alberta*, the Supreme Court of Canada found Alberta's human rights legislation to violate Section 15 of the *Charter* for being under-inclusive.[133] The legislation failed to include the protected ground of sexual orientation. The Court noted that it could be reasonably inferred that the absence of any legal recourse for discrimination on the ground of sexual orientation perpetuated and even encouraged that kind of discrimination.[134] Accordingly, it is possible that the omission of certain grounds relating to Aboriginal people could constitute discrimination under the *Charter*.

4.4.2. Needs and recommendations for strengthening the CHRA

4.4.2.1. The listed grounds of discrimination

Participants to the dialogue sessions repeatedly voiced the concern that the listed grounds of discrimination in the *CHRA* were too narrow and did not reflect the inclusion of Aboriginal peoples and our needs.[135] They noted the fact that the listed grounds did not include "Bill C-31 Indian", "non-status Indian", and "off-reserve Indian" among others.[136] As discussed in Appendix A to this report, these are terms created by the

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133 *Vriend v. Alberta*, [1998] 1 S.C.R. 493.

134 *Ibid.*, at para. 99.

135 *Final Report on Needs Assessment, supra,* note 7., at p. 6, BC United Native Nations Society, 9th bullet; p. 9, Alberta session, 9th bullet; p. 10, and Manitoba Indigenous Peoples Confederacy, 6th bullet.

136 *Final Report on Needs Assessment, ibid.*, at p. 9, Alberta session, 9th bullet; p. 9 , Aboriginal Affairs Coalition of Saskatchewan, 20th bullet; and p. 10, Manitoba Indigenous Peoples Confederacy, 6th bullet.

Indian Act, that have a long history of being used by the Canadian government, as well as *Indian Act* band councils, to differentiate, separate, and exclude some Aboriginal peoples in relation to rights, benefits and entitlements for over a hundred years.

There are 11 listed grounds of discrimination listed in the *CHRA*: race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability or conviction for an offence for which a pardon has been granted.[137] It is noteworthy that even the ground "Aboriginal origin" does not appear in this list, although discrimination on the basis of Aboriginal origin is often characterized either as discrimination on the basis of "race" or "national or ethnic origin".[138]

While the grounds in human rights legislation are often described as "closed grounds", several interpretive principles that apply to the *CHRA* in fact allow several unlisted grounds to be linked to listed grounds and therefore be protected. In fact, Tribunal and court decisions have linked several characteristics particular to the discrimination faced by Aboriginal people to the listed grounds in the *CHRA*. The result is that, while not specifically listed, several identity characteristics of Aboriginal people have already been found to be protected under the Act:

1) A complainant being treated differently on the basis of being from a different Aboriginal nation than that of the respondent Aboriginal nation (e.g., Ojibway vs. Cree) has been linked to the listed grounds of "ethnic or national origin".[139]

2) A complainant being treated differently on the basis of being Métis and not being a Treaty Indian has been linked to the listed grounds of "ethnic or national origin".[140]

3) A complainant with Aboriginal identity being denied membership in an Indian band for not meeting a 50% Indian blood quantum requirement has been linked to discrimination on the grounds of "race, national or ethnic origin".[141]

4) Differential treatment on the basis of a person being re-instated to Indian status by Bill C-31 has been linked to discrimination on the combined grounds of "sex" and "marital status" or "family status".[142] Similar reasoning

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137 CHRA, *supra*, note 1 at s.3.

138 See, for example, *Bignell-Malcolm v. Ebb and Flow Indian Band*, 2008 CHRT 3 (CanLII) ("*Bignell*").

139 *Rivers v. Squamish Band Council*, 1994 CHRT 3; and *Bignell, ibid.*

140 *Deschambeault v. Cumberland Cree Nation*, 2008 CHRT T1253/6507.

141 *Jacobs v. Mohawk Council of Kahnawake*, 1998 CHRT 2.

142 *Raphael et al. v. Conseil des Montagnais du Lac Saint-Jean*, 1995 CHRT 10; and *Laslo v. Gordon Band Council*, 1996 CHRT 12. See also *McIvor v. Canada (Registrar of Indian and*

> could be applied to find that any discrimination occurring to persons who are entitled to Indian registration under the recently passed Bill C-3 is linked to similar grounds.

While the Tribunal has yet to definitively link the characteristics of being a "non-status Indian" or an "off-reserve Indian" to listed grounds under the *CHRA*, a reasonable interpretation of the Act suggests these can be linked to the listed grounds. Decisions under Section 15(1) of the *Canadian Charter of Rights and Freedoms* support such an interpretation.

In the *McIvor* decision, the trial judge recognized that the characteristic of having "Indian status" goes beyond entitlement to tangible benefits, and while originally a colonial construct, Indian status has taken on a greater intangible benefit that goes to a person's cultural identity:

> [T]he concept of Indian, has come to exist as a cultural identity alongside traditional concepts. The concept has become and continues to be imbued with significance in relation to identity that extends far beyond entitlement to particular programs."[143]

The trial judge went on to compare "Indian status" to nationality and citizenship and noted that the government could not simply dismiss having "status" as being simply an entitlement to benefits.[144] The British Columbia Court of Appeal agreed with the trial judge that intangible benefits flow from the right to Indian status.[145]

In CAP's view, the *McIvor* case supports an interpretation of the ground of "national or ethnic origin" to include distinctions based on whether a person is a status Indian or not. The Aboriginal identity characteristic of being "non-status Indian" could therefore be reasonably linked to those listed grounds.

With respect to the Aboriginal identity characteristic of being "off-reserve Indian", the *Corbière* decision confirmed that Aboriginality-residence constitutes a ground of discrimination analogous to the listed grounds under Section 15(1) of the *Charter*.[146] It did so on the basis that "off-reserve" is a significant personal characteristic to some Aboriginal peoples:

Northern Affairs), [2007] 3 C.N.L.R. 72 (BCSC), rev'd [2009] 2 C.N.L.R. 236 (BCCA), leave to appeal refused [2009] S.C.C.A. No. 234.

143 *McIvor* BCSC, *ibid.*, at para. 133.

144 *Ibid.*, at paras. 192-193.

145 *McIvor* BCCA, *supra*, note 82 at paras. 70 and 71.

146 *Corbière, supra*, note 5 at para. 6.

> "Aboriginal residence" is a personal characteristic essential to a band member's personal identity, which is no less constructively immutable than religion or citizenship. Off-reserve Aboriginal band members can change their status to on-reserve band member only at great cost, if at all.[147]

While the *Corbière* case involved a discrimination complaint by off-reserve status Indian band members, the analogous grounds of "Aboriginal residence" has since been interpreted in the *Charter* context to include both off-reserve status and non-status Indians.[148]

It is possible that off-reserve status can be linked to the listed grounds of "sex" and "family status", for example, where the reason a person is an off-reserve Indian stems from the fact that he or she, or a direct ancestor, was denied status on the basis of the pre-1985 "marrying out" provisions of the *Indian Act*. In addition, it is CAP's position that if "national or ethnic origin" includes "Aboriginal origin" then any subset of Aboriginal identity that has been recognized as a personal characteristic, such as "status Indian", "non-status Indian" or "off-reserve Indian", is included in this listed ground. This stems from the interpretive principle endorsed by the Supreme Court of Canada in the *Brooks v. Canada Safeway Ltd.* case.[149]

The *Brooks* case involved the question of whether the listed ground of "sex" in Manitoba's *Human Rights Act*, included "pregnancy" for the purposes of grounding a claim of discrimination. It was argued that "sex" did not include "pregnancy" because not all women are pregnant at the same time. Chief Justice Dickson, on behalf of the Court, strongly rejected this argument on the following basis:

> I am not persuaded by the argument that discrimination on the basis of pregnancy cannot amount to sex discrimination because not all women are pregnant at any one time. While pregnancy-based discrimination only affects part of an identifiable group, it does not affect anyone who is not a member of that group. Many, if not most, claims of partial discrimination fit this pattern. As numerous decisions and authors have made clear, this fact does not make the impugned distinction any less discriminating.[150] [emphasis added]

In CAP's view, the logic applied by the Court in *Brooks* to find that pregnant women are entitled to protection on the ground of "sex" applies with equal force to the finding that

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147 *Ibid.* at para. 14.

148 See *Ardoch Algonquin First Nation v. Canada (Attorney General) (sub nom. "Misquadis")*, 2002 FCT 1058 at para. 14.

149 *Brooks v. Canada Safeway Ltd.*, [1989] 1 S.C.R. 1219.

150 *Ibid.*, at para. 47.

subsets of Aboriginal identity are entitled to protection on the ground of "national or ethnic" / Aboriginal origin:

> *Not all women are pregnant, but all those who are pregnant are women, and therefore are entitled to protection under the ground of "sex".*
>
> *Not all Aboriginal people are non-status or off-reserve Indians, but all non-status or off-reserve Indians are Aboriginal peoples, and therefore are entitled to protection under the ground of "national, ethnic or Aboriginal origin".*

With respect to Aboriginal residency, this argument is further supported by the following comments of the Supreme Court of Canada in *Corbière*:

> ... the analogous ground of off-reserve status or Aboriginality-residence is limited to a subset of the Canadian population, while s. 15 is directed to everyone. In our view, this is no impediment to its inclusion as an analogous ground under s. 15. Its demographic limitation is no different, for example, from pregnancy, which is a distinct, but fundamentally related form of discrimination from gender. "Embedded" analogous grounds may be necessary to permit meaningful consideration of intra-group discrimination.[151]

It is CAP's position that all of the subsets of Aboriginal identity discussed above can be linked to listed grounds in the *CHRA*, and therefore, are themselves protected grounds under the Act. This is supported by a reasonable interpretation of the *CHRA*, supported by Supreme Court of Canada cases.

Although a person with legal training familiar with the *CHRA* might know this, most Aboriginal people would not. Indeed, the participants in CAP's dialogue sessions did not know this and assumed the Act did not cover many of the grounds in which they have experienced discrimination. It is CAP's view that the Commission can easily address this perceived problem by publishing guidelines under its Section 27(2) guideline-making power in order to clarify how the listed grounds of discrimination cover various aspects of Aboriginal identity.

22. The Commission should publish guidelines under Section 27(2) of the *CHRA* clarifying that the listed grounds of prohibited discrimination that can be reasonably interpreted to include the following grounds relating to Aboriginal people:

- **Aboriginal origin**
- **Being from a different Aboriginal group**
- **Being of mixed Aboriginal ancestry**

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151 *Corbière*, *supra*, note 5 at para. 15

- **Being a Bill C-31 status Indian**
- **Being a Bill C-3 status Indian**
- **Being a non-status Indian**
- **Being a status Indian non-band member**
- **Being an off-reserve Indian, whether status or non-status**[152]

Should the *CHRA* be slow or unwilling to act on this recommendation, it is CAP's position that the Government of Canada has an obligation to address these perceived gaps by amending the *CHRA* accordingly. This could be accomplished by the Government adding two additional grounds to the listed grounds: 1) Aboriginal origin; and 2) Aboriginal residency. Applying the interpretive principle in *Brooks*, "Aboriginal origin" could be interpreted as including the many subsets of Aboriginal identity that have come to be significant to Aboriginal people. As suggested above, "Aboriginal origin" should be interpreted to cover "Aboriginal residency", however, given the importance of this personal characteristic to many Aboriginal people, it may be symbolically important to include it as a separate ground.

In this regard, it is noteworthy that in the decade since the *Corbière* decision, "Aboriginal residency" has been relied on as a ground to claim discrimination against the federal government and *Indian Act* band councils in at least eight other cases under Section 15(1) of the *Charter*.[153] This in itself speaks to the prevalence of this ground being perceived as a basis of discrimination.

To CAP's knowledge, no complaint has yet to be brought to the CHRC on the basis of "Aboriginal residence", which speaks to the perception that this ground is not covered by the *CHRA*. This perception, whether it is in fact true, causes an injustice to Aboriginal claimants by depriving them of the accessible remedial procedures under the *CHRA*, leaving them to believe they must seek resolution in the courts under the *Charter*. It may also send the message that discrimination on the basis of "off-reserve status" is not as serious or deserving of condemnation as other forms of discrimination. As has been

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[152] This recommendation is based on the needs articulated *supra* at notes 75 and 76 and the subsequent discussion of legal principles.

[153] *Ardoch Algonquin First nation & Allies v. Ontario ("Lovelace")*, 2000 SCC 37; *Ochapowace Indian Band v. Saskatchewan (Department of Community Resources)*, 2007 SKQB 87; *Jean v. Canada (Indian Affairs and Northern Development)*, 2009 FCA 377 (CanLII); *Ardoch Algonquin First Nation v. Canada (Attorney General) ("Misquadis")*, 2002 FCT 1058; *Native Council of Nova Scotia v. Canada (Attorney General)*, 2011 FC 72; *Thompson v. Leq'á:mel First Nation*, 2007 FC 77; *Esquega v. Canada (A.G.)* ("Gull Bay"), 2007 FC 878; and *Woodward v. Council of the Fort McMurray*, 2010 FC 337.

suggested elsewhere, the omission of "Aboriginal residency" from the *CHRA* may constitute a Section 15(1) *Charter* violation similar to that found in the *Vriend* case.[154]

23. The Government of Canada should amend the *CHRA* to include the listed grounds of "Aboriginal origin" and "Aboriginal Residency".[155]

Another area where CAP believes the *CHRA* could be strengthened to protect the interests of Aboriginal peoples is by adding "political belief or opinion" as a prohibited ground. In the dialogue sessions, some participants spoke of how internal politics within *Indian Act* band councils can result in denial of employment and other services.[156] Several provincial human rights statutes already include "political belief", "political opinion" or "political conviction" as a listed ground.[157]

To date, the ground of "family status" has been interpreted in cases involving Aboriginal claimants to consider discrimination complaints on the basis of "nepotism" in employment-hiring practices by *Indian Act* band councils.[158] While this is one way of addressing discrimination that arises from internal politics within Aboriginal communities, this approach falls short, since it requires the complainant to prove the discrimination arose from their family connections, instead of directly focusing on the heart of the problem: discrimination arising from political opinion or belief.[159] It is CAP's position that it would be preferable for the Government of Canada to amend the *CHRA* to include "political belief or opinion" as a listed ground of discrimination.

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154 See Congress of Aboriginal Peoples, *Justice is Equality: Post-Corbière Report*, April 2008.

155 This recommendation is based on the needs articulated *supra* at notes 75 and 76 and the subsequent discussion of legal principles.

156 See *Final Needs Assessment Report, supra* note 7, p. 14-15, Native Council of Nova Scotia, 11th bullet.

157 See *Human Rights Act*, 2010, S.N.L. 2010, c. H-13.1, s.9(1); *The Human Rights Code*, C.C.S.M. c. H175, s.9(2)(k); *Human Rights Act*, R.S.P.E.I. 1988, c. H-12, s.1(1)(d); *Charter of human rights and freedoms*, R.S.Q. c. C-12, s.10; *Human Rights Act*, R.S.N.S. 1989, c. 214, s.5(1)(u); and *Human Rights Act*, R.S.Y. 2002, c. 116, s.7(j).

158 See *Rivers v. Squamish Band Council*, 1994 CHRT 3 and Maurice *Bressette v. Kettle and Stony Point First Nation Band Council*, 2004 CHRT 40.

159 In the case *Jamieson v. Victoria Native Friendship Center* (1994), 22 C.H.R.R. 250, a broad definition of "political belief" was adopted. There, the complainant was refused a position with the respondent Friendship Center, allegedly because of his outspoken support of the stance of the Mohawk Nation during the Oka crisis. The BC Council of Human Rights adopted a definition of "political" including "belonging to, or taking, a side in politics" and had no difficulty in finding that the complainant, although he did not believe in, and was not involved in any registered political party, had suffered discrimination by reason of his "political belief".

24. The Government of Canada should amend the *CHRA* to include the listed ground "political belief or opinion".[160]

4.4.2.2. Discriminatory practices and protected areas

Part 1 of the *CHRA* prohibits discriminatory practices in a number of protected areas, including employment, housing accommodation, delivery of public services and goods and public advertising. While the list attempts to be fairly comprehensive, it does not specifically address some areas of discrimination that are common to the experience of Aboriginal people, such as discrimination in respect of *Indian Act* or band council election laws, *Indian Act* registration or band council membership laws, and government funding of services and programs to Aboriginal people, to name a few. Consequently, as with the listed ground of prohibited discrimination, there is the potential that Aboriginal complainants will perceive the protected areas as too narrow and not inclusive of their needs and experiences. Indeed, several participants in the dialogue sessions indicated uncertainty about whether, under the *CHRA*, they could bring complaints relating to the *Indian Act* or band council election rules,[161] the *Indian Act* registration provisions or band council membership rules,[162] and other areas like Canada's provision of non-insured health benefits.[163]

It is CAP's position that all of the above-identified areas fall under the listed protected areas in the *CHRA* under a fair, large and liberal interpretation of the Act, in particular Section 6 of the Act, which prohibits discriminatory practices in the provision of goods, services, facilities and accommodations.[164] The Tribunal has already ruled that discriminatory membership codes that deny access to on-reserve programs and services constitute a denial in respect of goods and services.[165] Although the status of voting in band council elections as a public service has yet to be decided by the Tribunal, the right to vote in band elections can readily be seen as a public service since it is directly linked to access to programs and services in the band.[166] In a provincial human rights decision, the lack of accessibility of a voting facility to a person with a disability was

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160 This recommendation is based on the needs articulated *supra* at note 96.

161 *Final Report on Needs Assessment*, *ibid.*, at p. 6, BC Union Native Nations Society, 15th bullet.

162 *Final Report on Needs Assessment*, *ibid.*, at p. 6, BC Union Native Nations Society, 5th and 10th bullet.

163 *Final Report on Needs Assessment*, *ibid.*, at p. 6, BC Union Native Nations Society, 13th bullet.

164 CHRA, *supra*, note 1 at s.6.

165 See *Jacobs v. Mohawk Council of Kahnawake*, *supra*, note 81 and *Raphael v. Montagnais du Lac Saint-Jean Council*, supra, note 82.

166 For further reading, see *Justice is Equality – Post-Corbière Report*, *supra*, note 94.

found to be a denial of a public service.[167] On similar reasoning, the Tribunal could find that the denial of the right to vote in a band council election is a denial of a public service.

Generally, the Tribunal has interpreted the provision of services broadly to include any service or facility offered to Aboriginal peoples by a band council or the Government of Canada through the Department of Indian and Northern Affairs.[168]

It is CAP's view that the protected areas under the *CHRA* are reasonably capable of being interpreted as including those areas identified above that are common to the experience of Aboriginal people. In order to avoid confusion and uncertainty for Aboriginal claimants and avoid unnecessary legal disputes in the future where respondents will try to narrow breadth of protection under the Act, it is CAP's position that the Commission should adopt Section 27(2) guidelines to provide clarity in this area.

25. The CHRC publish guidelines under Section 27(2) of the *CHRA* clarifying that discriminatory practices in respect of "goods, services, facilities or accommodation customarily available to the general public" can include discrimination in respect of *Indian Act* or band council election laws, *Indian Act* registration or band council membership laws, and federal funding of services and programs to Aboriginal people.[169]

4.4.2.3. Justifying discrimination and the new non-derogation and interpretive provisions

In reviewing the law with respect to reasonable justifications for discrimination, including the role of the new non-derogation and interpretive provisions that were added to the *CHRA* through the repeal legislation, participants raised a number of points.

First and foremost, it was pointed out that given the history of discrimination they have faced, the justification for discrimination test should not be interpreted lightly when

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167 See *East v. Saskatchewan (Chief Elector Officer)*, (2007) Saskatchewan Human Rights Tribunal.

168 See *Jacobs v. Mohawk Council of Kahnawake*, *supra*, note 148, and *Louis and Bettie v. INAC*, 2011 CHRT 2 at paras. 44-49. The Tribunal in *Louis and Bettie* concluded that INAC does provide services that are "customarily available to the general public," namely that to segment of the public who are status Indians, and that these are beneficial services being "held out" and "offered to the public."

169 This recommendation is based on the needs articulated *supra* at notes 169-171.

claimants are Aboriginal women or non-status Indians.[170] CAP agrees strongly with this position. It will be crucial for the Tribunal and the courts to consider these justifications to discrimination within the context of the history of discrimination faced by Aboriginal people, in particular, the off-reserve, status and non-status population, as discussed in Section 3 of Appendix A to this report.

Participants at the dialogue sessions also indicated confusion over how both the non-derogation and interpretive clauses would be applied by the Commission and Tribunal.[171] The provisions, especially the interpretive clause, are complexly drafted and difficult to understand. Some participants expressed concerns that the inherent right to self-government would be broadly used by *Indian Act* band councils to justify all complaints of discrimination, even those brought by band members.[172] One participant expressed concern that the interpretive clause would be used as a "smoke screen by those who have a personal interest in maintaining the *status quo* of unfairness and discrimination."[173]

While CAP supports the inclusion of the non-derogation clause to protect Aboriginal and Treaty rights and the interpretive clause to ensure that due regard is given to Aboriginal traditions, customs and laws, it shares the concerns expressed by participants at the dialogue sessions that such provisions could be used to perpetuate the historic discrimination of the *Indian Act*, in particular to the detriment of CAP constituents, that is, the off-reserve status and non status Indian population. To avoid such a result, CAP recommends that the Commission develop guidelines under Section 27(2) to guide interpretation of such provisions. CAP feels strongly that it is the Commission's role to guide the interpretation of these provisions so as to avoid further discrimination and not just leave this to tribunals and courts to decide on a case-by-case basis.
Considerations that should be guiding the Commission in developing such guidelines include:

- When draft legislation for repealing Section 67 was being considered, the language of the interpretive clause suggested by the Assembly of First Nations contained specific language to protect the provision of services by *Indian Act* band councils to its members on an exclusive or preferential basis.[174] Such language was not adopted in

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170 *Final Report on Needs Assessment, supra*, note 7 at p. 11, Ontario Coalition of Aboriginal People, 12th bullet.

171 *Final Report on Needs Assessment, ibid.*, at p. 11, Ontario Coalition of Aboriginal People, 9th bullet.

172 *Final Report on Needs Assessment, ibid.*, at p. 7, Alberta session, 7th bullet.

173 *Final Report on Needs Assessment, ibid.*, at p. 8, Alberta session, 28th bullet.

174 Assembly of First Nations, *First Nations Perspectives on Bill C-44 (Repeal of Section 67 of the Canadian Human Rights Act)* – A submission to the House of Commons Standing Committee on Aboriginal Affairs and Northern Development, March 29, 2007, Appendix B.

the final version of Bill C-21. In CAP's view, Parliament's rejection of the AFN's language is indicative of a legislative intent not to sanction an approach to the interpretive clause that would allow *Indian Act* band councils to automatically justify discrimination involving preferential treatment in the provision of services, employment and housing to its members. Furthermore, such an approach is inconsistent with existing decisions of the Canadian Human Rights Tribunal.[175]

- With regard to the application of the non-derogation provision, guidance on its application should be drawn from the reasons of Justice Bastarache in *R. v. Kapp*.[176] In that case, the judge was discussing the interpretation of Section 25 of the *Charter*, however, his observations and limits placed on Section 25 are equally applicable to non-derogation clause in the *CHRA*.

  Speaking of the purpose of Section 25, Justice Bastarache wrote:

  > I believe the reference to "aboriginal and treaty rights" suggests that the focus of the provision is the uniqueness of those persons or communities mentioned in the Constitution; the rights protected are those that are unique to them because of their special status. ... Accordingly, legislation that distinguishes between aboriginal and non-aboriginal people in order to protect the interests associated with aboriginal culture, territory, sovereignty or the treaty process deserves to be shielded from Charter scrutiny.[177]

  In Bastarache J.'s view, the purpose of Section 25 is to shield attacks on rights that Aboriginal peoples' hold by virtue of their special constitutional status by non-Aboriginals. However, Bastarache J. did not see the protection offered by Section 25 as unlimited. Consistent with the purpose of Section 25 – to prevent attacks on Aboriginal rights held by virtue of being Aboriginal by non-Aboriginals peoples – the judge found that Section 25 cannot be used to shield discrimination complaints by other Aboriginals:

  > There is no reason to believe that s. 25 has taken Aboriginals out of the *Charter* protection scheme. One aboriginal group can ask to be given the same benefit as another aboriginal group under s. 15(1). ... It could also be argued that it would be contrary to the purpose of s. 25 to prevent an Aboriginal from invoking those sections to attack an Act passed by a band council. It is not at all obvious in my view that it is

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175 See *MacNutt v. Shubenacadie Indian Band Council*, 1995 CanLII 1164 (C.H.R.T.); *Jacobs v. Mohawk Council of Kahnawake, supra*, note 81; and *Raphael et al. v. Conseil des Montagnais du Lac Saint-Jean, supra*, note 82.

176 *R. v. Kapp*, 2008 SCC 41.

177 *Ibid.*, at para. 103.

> necessary to constrain the individual rights of Aboriginals in order to recognize collective rights under s. 25.[178] [Emphasis added]

It is CAP's position, based on the guidance provided in *R. v. Kapp*, that the *CHRA*'s interpretive provision should be interpreted to prevent "reverse discrimination" attacks to rights that Aboriginal people hold by virtue of Section 35 of the *Constitution Act*. It should not be used, however, to shield discrimination complaints of individual Aboriginal people who argue that a scheme or program based on an Aboriginal right is discriminatory.

- Although the new non-derogation clause in the *CHRA* is more narrowly worded than Section 25 of the *Charter*, it is CAP's position that Section 1.1 should be interpreted consistently with Section 25 such that not only are Aboriginal and Treaty rights protected by the new non-derogation clause, but also those rights identified in Section 25(a) and (b):

> 25. The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including
>
> (a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and
> (b) any rights or freedoms that now exist by way of land claims agreements or may be so acquired.

- It is CAP's position that the language of all statutory non-derogation clauses should mirror the language and guarantees found in Section 25(a) and (b) of the *Charter*. The protections to Aboriginal rights in Section 25 should not be qualified by any statutory provision. Therefore, it is CAP's position that the new non-derogation clause in the *CHRA* should be amended to reflect the language in Section 25 of the *Charter*.[179]

- The *CHRA* will now need to be interpreted in light of the UN Declaration on the Rights of Indigenous Peoples. Canadian rules of statutory interpretation require courts and tribunals to interpret domestic legislation consistently with Canada's international human rights obligations absent an express provision to the contrary

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178 *Ibid.*, at para. 99.

179 While these concerns were not specifically voiced during the dialogue sessions, as time constraints prevented an exhaustive review of the CHRA, CAP constituents have an obvious interest in the non-derogation provision being interpreted as generously as possibly in favour of Aboriginal peoples. ,

within the domestic statute. [180] The Declaration requires that Indigenous Peoples' rights be determined in accordance with their customs and traditions. This right, however, should not be used to perpetuate the kind of divisions, exclusions and discrimination perpetuated by the *Indian Act* for over a hundred years. In CAP's view, internalized *Indian Act* values cannot be equated with the traditions and customs of Aboriginal peoples. Such an approach would be inconsistent with the values of non-discrimination and equality emphasized throughout the Declaration (reviewed at Section 5 of Appendix A to this report).

26. The Commission develop guidelines under Section 27(2) to guide the interpretation of the interpretive and non-derogation provisions. At a minimum, such guidelines should include:

- Clear direction that the interpretive provision should not be interpreted to perpetuate historic inequalities created by the Indian Act;

- Clear direction that the interpretive clause should not be interpreted to allow Indian Act band councils to automatically justify discrimination on the basis of providing preferential treatment to their members;

- Clear direction that the non-derogation provision is meant to shield "reverse-discrimination" complaints by non-Aboriginals against Aboriginal peoples' Aboriginal and Treaty rights, and not shield complaints of discrimination by Aboriginal people against other Aboriginal people.

- Clear direction that the non-derogation provision should be interpreted to include identical protection to that found in Section 25, including subsections (a) and (b), of the Charter.

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[180] R. Sullivan, *Sullivan on the Construction of Statutes*, 5th ed., LexisNexis Canada Inc., 2008, at p. 538. In *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, at para. 70, Justice L'Heureux-Dubé stated that "the values reflected in international law may help inform the contextual approach to statutory interpretation and judicial review." More recently, in the case of *R. v. Sharpe*, [2001] 1 S.C.R. 45 at para. 176, Chief Justice McLachlin wrote: "[A] balancing of competing interests [in domestic legislation] must be informed by Canada's international obligations. The fact that a value has the status of an international human right is indicative of the high degree of importance with which it must be considered...".

- Clear direction that the UN Declaration on the Rights of Indigenous Peoples is to be used to interpret the *CHRA*, including the interpretive clause, however, any interpretation based on the Declaration is to be consistent with the principle of non-discrimination repeatedly expressed throughout the Declaration.[181]

27. It would also be helpful for the Commission to provide further guidance, beyond the above minimum guidelines, about how the interpretive clause should be applied by the Tribunal. The Commission should undertake further research from both an Aboriginal collective and Aboriginal individual perspective on how the interpretive provision should be applied. Any recommendations arising from such a study should be added to the guidelines.[182]

28. The customary laws, traditions, and practices of Aboriginal peoples should be gathered, compiled, and stored after obtaining free, prior and informed consent of Aboriginal peoples. This traditional knowledge and cultural information should be protected in a *sui generis* model to prevent cultural misappropriation. Access to this information should only be granted to Aboriginal complainants, the Commission and Tribunal. Research will be required on how this process should be accomplished, especially with the free, prior and informed consent of Aboriginal peoples.[183]

29. Parliament should amend the new non-derogation clause in the *CHRA* to reflect the language and guaranteed protections in Section 25 of the Charter.[184]

4.4.2.4. Procedures for bringing a complaint

In reviewing the procedures for bringing a complaint under the *CHRA*, many participants were surprised and concerned to hear of the one-year time limit at Section 41(1)(e),[185] which provides as follows:

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181 This recommendation is based on the needs articulated *supra* at notes 111-113 and the subsequent discussion of legal principles.

182 Based on Recommendation 22 of *Final Report on Needs Assessment*, *supra*, note 7., at p. 22.

183 Based on Recommendation 14 of *Final Report on Needs Assessment*, *ibid.*, at p. 21.

184 This recommendation is based on the need articulated *supra* at note 120.

185 *Final Report on Needs Assessment*, *supra*, note 7 at p. 9, Aboriginal Affairs Coalition of Saskatchewan, 18th bullet; p. 10, Manitoba's Indigenous Peoples Confederacy, 15th bullet; and p. 11, Ontario Coalition of Aboriginal People, 11th bullet.

> 41(1) Subject to section 40, the Commission shall deal with any complaint filed with it unless in respect of that complaint it appears to the Commission that
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> ...
>
> (e) the complaint is based on acts or omissions the last of which occurred more than one year, or such longer period of time as the Commission considers appropriate in the circumstances, before receipt of the complaint.[186]

While Section 41(1)(e) admits some discretion in Commission staff to extend the one year time limit, the Commission has no published guidelines on what types of factors should be considered in the exercise of such discretion. Guidelines of other human rights commissions with similar time limits, such as the New Brunswick Human Rights Commission, suggest that the exceptions to such time limits are narrow. The New Brunswick guidelines require the complainant to have a justifiable reason for the delay, such as being under a mental disability or having first gone through a statutory or internal redress procedure before filing the complaint.[187] The complainant must show that he or she has a strong *prima facie* case and that granting the extension would not unduly prejudice the respondent.

It is CAP's submission that the one-year time limit works unfairly for Aboriginal claimants, and that exceptions, such as those found in the New Brunswick guidelines, are too narrow to address Aboriginal peoples' life realities and the many barriers we face on a daily basis.

30. The one-year time limitation at Section 41(1)(e) of the *CHRA* should be repealed, or in the least, increased by legislative amendment.

31. In the interim, the Commission should publish guidelines under Section 27(2) of the *CHRA* guideline-making power directing how the discretionary aspect of Section 41(1)(e) should be sensitively applied in the case of Aboriginal complainants given a number of factors:

1) having been precluded from bringing some complaints under the *CHRA* for over 30 years;

2) the "chill" this may have created in seeking resolution of their human rights complaints, even for those type of complaints not technically precluded from adjudication under the *CHRA* prior to the repeal of Section 67;

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186 CHRA, *supra* note 1, s. 41(1)(e).

187 New Brunswick Human Rights Commission Guideline, "Time Limit Extension for Complaint Initiation" (1996), accessible at http://www.gnb.ca/hrc-cdp/e/g/guideline-on-time-extension.pdf.

3) the lack of accessible education and information about human rights resolution, particularly for Aboriginal peoples; and

4) the impacts of colonialism, in particular, feelings of powerlessness engendered in some Aboriginal people about addressing wrongs done to them.[188]

32. In the guidelines, the Commission should also clarify that an Aboriginal complainant will not be penalized by having the one year time limit continue to run where he or she participates in any alternative dispute resolution process, including an Aboriginal nation's or band council's internal dispute process. The time limit for filing should be suspended during such processes.[189]

4.4.2.5. Conclusion

Finally, CAP was not able to review every aspect of the *CHRA* with the participants at the dialogue sessions given time and resource considerations. There may well be further areas under the *CHRA* that could be strengthened or clarified.

33. The Commission should undertake, in consultation with Aboriginal peoples, a study to determine what clarification or amendments should be made to the *CHRA*, and the process and procedures of both the Commission and Tribunal to better meet the needs of Aboriginal peoples, and prepare and submit a special report to Parliament on this basis pursuant to 61(2) of the *CHRA*.[190]

4.5. Canada's responsibility for promoting and respecting the human rights of Aboriginal peoples

4.5.1 Need for sufficient government funding

A number of the recommendations in this report implicate the Commission providing additional services to Aboriginal peoples beyond that which it is already providing. This is not possible without an increase in funding to the Commission. In its 2008 report, "Still

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188 This recommendation is based on the need articulated *supra* at note 126.

189 This recommendation is also based on the need articulated *supra* at note 126.

190 Based on Recommendations 2 and 12 of *Final Report on Needs Assessment*, *supra*, note 7, at p. 19 and 21. Section 61(2) of the CHRA, *supra*, note 1, provides as follows: "(2) The Commission may, at any time, prepare and submit to Parliament a special report referring to and commenting on any matter within the scope of its powers, duties and functions if, in its opinion, the matter is of such urgency or importance that a report on it should not be deferred until the time provided for submission of its next annual report under subsection (1)."

a Matter of Rights", the Commission emphasized the importance of adequate funding in order to effectively implement the repeal of Section 67:

> ... No matter how good a human rights system may appear on paper, it will not be effective unless adequate funding is provided to implement it properly.
>
> The Commission does not have the resources to address the new demands resulting from the repeal. At the moment, very limited resources are dedicated to addressing Aboriginal issues currently within our mandate. ....[191]

Adequate funding continues to be an issue for the Commission. In 2010, funding considerations caused the Commission to close three regional offices in Vancouver, Toronto and Halifax. These closures are a great cause of concern for CAP and its affiliates. To provide the level of services required by Aboriginal people, the Commission must be adequately funded, staffed and accessible throughout the country.

Not only does the Commission require adequate funding but so do Aboriginal communities and organizations who will be assisting their people in gaining greater awareness about the human rights system. To date, the federal government has not invested in off-reserve Aboriginal organizations (or any other Aboriginal community or organization during the three year transition period) so that they can educate and assist their constituents concerning the *CHRA*. Investment in capacity building (leadership, education on human rights/equality, policy and program development, review and delivery) will be required to meet the equality rights of their members.

34. The Government of Canada must provide sufficient funding to the Commission to provide the level of services required by Aboriginal peoples in light of the repeal of Section 67. This increase in funding should contemplate the reopening of the Commission's regional offices that were closed in 2010.[192]

35. The Government of Canada must provide sufficient resources to CAP and its affiliates to build up internal capacity regarding the *CHRA* and to assist their constituents concerning the *CHRA*.[193]

36. In particular, the federal government must provide financial resources for CAP and each of its affiliate organizations to hire two people to provide assistance and

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191 Canadian Human Rights Commission, "Still a Matter of Rights – A Special Report of the Canadian Human Rights Commission on the Repeal of Section 67 of the *Canadian Human Rights Act*" (January 2008), at p. 16.

192 Based on Recommendation 13 of *Final Report on Needs Assessment*, *supra* note 7, at p. 21.

193 Based on Recommendation 16 of *Final Report on Needs Assessment*, *ibid.*, at p. 22.

information on the CHRC and CHRT procedures and processes for Aboriginal peoples who wish to file complaints of discrimination with the Commission.[194]

37. In general, federal investment in all Aboriginal communities and organizations is required to further the equality rights of Aboriginal peoples.[195]

38. Further to the discussion in Section 3 of Appendix A to this report, *Indian Act* band councils who may have potentially discriminatory membership codes and election codes (which Canada bears some responsibility for) should be provided with adequate funding to review and develop non-discriminatory codes.[196]

4.5.2 Need for the Government of Canada to proactively address discrimination affecting Aboriginal peoples within its laws, policies and departments

The federal government is offering the Commission as a forum to address complaints of discrimination arising from the *Indian Act*. However, the federal government is currently defending some claims of discrimination on the basis that the CHRC does not have jurisdiction to hear complaints. For example, the First Nations Child and Family Caring Society ("FNCFCS") filed a complaint with the Commission alleging that INAC's underfunding of federal child welfare services in comparison to provincially funded child welfare agencies constitutes discrimination under Section 5 of the *CHRA*. Section 5 of the *CHRA* prohibits discrimination in the delivery of "services" by federally regulated bodies.[197]

INAC has asserted that it is a funding agency and therefore is not providing a "service" pursuant to Section 5 of the *CHRA*, and alternatively, that federal funding cannot be compared to provincial funding for the purpose of establishing discrimination. The Tribunal recently dismissed the FNCFCS's complaint based on the latter argument.[198] The decision is under appeal. If Canada is successful with either defence, the repeal of Section 67 of the *CHRA* will be of limited use in assisting Aboriginal people to seek protection and achieve equality under the *CHRA*.

Canada is also arguing that it is not subject to the *CHRA* in a number of other cases challenging the *Indian Act*, including complaints of discrimination against the Indian

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194 Based on Recommendation 24 of *Final Report on Needs Assessment*, *ibid.*, at p. 23.

195 Based on Recommendation 17 of *Final Report on Needs Assessment*, *ibid.*, at p. 22.

196 This is also based on Recommendation 17 of *Final Report on Needs Assessment*, *ibid.*, at p. 22.

197 CHRA, *supra* note 1, s.5.

198 *FNCFCS et al. v. Attorney General of Canada*, 2011 CHRT 4.

registration provisions under Section 6 of the *Indian Act*, which as discussed in Section 3 of Appendix A to this report, has been and continues to be a major source of inequality and discrimination for many Aboriginal people.

In a recent case involving the Department of Indian Affairs' discretionary authority to approve locatee leases by Indians holding certificates of possession under Section 58(3) of the *Indian Act*, Canada once again argued that the Tribunal lacked jurisdiction to hear the complaint on the basis that this approval process did not constitute a "service" within Section 5 of the *CHRA*. The Tribunal rejected this argument, preferring to rely on previous cases that suggest that virtually everything government does is done for the public and therefore constitutes a service. The Tribunal held:

> I conclude that INAC does provide services that are "customarily available to the general public," namely to that segment of the public who are status Indians, and that these are beneficial services being "held out" and "offered" to the public.[199]

In this case, the Tribunal also commented on how the Department of Indian Affairs in its interactions with the Aboriginal complainant, Mr. Louie, was not living up to the "new relationship" it had promised following the repeal of Section 67:

> [I]t is noteworthy that on June 18, 2008, little more than a month after writing to Mr. Louie, the then Hon. Minister announced that legislation extending human rights protections to all First Nations communities had received Royal Assent. "Passage of Bill C-21, An Act to amend the *Canadian Human Rights Act* marks a significant turning point in the relationship between First Nations and the Government of Canada", said Minister Strahl. "It underscores this government's strong commitment to protecting the human rights of all Canadians." The announcement, however, had no apparent effect on INAC's position regarding the complainant's applications. Nothing changed, and the complaint before me is the result.[200]

Canada and its Department of Indian Affairs appear to be very resistant to the repeal of Section 67 of the *CHRA* and is setting a double standard. Their actions are sending the message that "*the CHRA applies to decisions of band councils but not to the decisions of INAC/Canada*." This double standard creates confusion, tarnishes the Honour of the Crown, and is not in keeping with the new relationship committed to by Canada upon the repeal of Section 67 and the endorsement of the UN Declaration on the Rights of Indigenous Peoples.

39. The federal government should immediately clarify its position on the jurisdiction of the Commission and Tribunal over services and funding provided

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199 *Louie and Beattie v. INAC*, *supra*, note 108 at para. 49.

200 *Ibid.*, at para. 58.

to Aboriginal peoples under the *Indian Act* or Canada's jurisdiction over "Indians and lands reserved for Indians" under Section 91(24) of the *Constitution Act, 1867*.[201]

As discussed in Section 3 of Appendix A to this report, many of the discrimination issues CAP constituents face arise from the application of provisions under the *Indian Act*, and INAC policies enacted pursuant to Canada's Section 91(24) jurisdiction for "Indian and lands reserved for Indians" under the *Constitution Act*, 1867.[202] For example, entitlement to many social programs delivered by *Indian Act* band councils is typically shaped by federal policy which invariably uses, depending on the program or service, Indian status, band membership, reserve residency or some combination of these characteristics.

Chief Commissioner, Jennifer Lynch, of the Commission has stated that, "A case-by-case, section-by-section approach to resolving discriminatory provisions of the *Indian Act* will be costly, confrontational and time-consuming. Moreover, the Act places the burden on complainants who do not necessarily have access to legal resources."[203]

The *Indian Act* contains many discriminatory provisions and should be repealed. However, a proactive review of the *Indian Act* should take place with an objective to replace it, if necessary, with one or more pieces of legislation that will meet the needs and rights of Aboriginal people in an equitable manner. Aboriginal people also have the right to self-government;[204] therefore, this review should take place in consultation with Aboriginal peoples in a process that is determined by them and supported by the federal and provincial/territorial governments.

40. The Government of Canada should consider reforming the *Indian Act*, in the least to remove its discriminatory provisions, in consultation with Aboriginal peoples, instead of requiring a case-by-case, section-by-section approach to resolving discriminatory provisions in the Act, which will be costly,

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201 Based on Recommendation 5 of *Final Report on Needs Assessment*, *supra* note 7, at p. 20.

202 *Final Report on Needs Assessment*, *ibid.*, at p. 13, New Brunswick Aboriginal Peoples Council, 12th bullet.

203 "Speaking notes for Jennifer Lynch, Q.C., Chief Commissioner of the Canadian Human Rights Commission, as a witness before the Standing Committee on Aboriginal Affairs and Northern Development - Bill C-3 - Gender Equity in Indian Registration Act", CHRC, online: CHRC < http://www.chrc-ccdp.ca/media_room/speeches-en.asp?id=597&content_type=2&lang_update=1>

204 *R. v. Pamajewon*, [1996] 2 S.C.R. 821.

confrontational and time-consuming, and places a burden on the complainant to initiate and bear the legal costs.[205]

4.6. The larger picture of Aboriginal equality / human rights

To end looking at the "big picture", Aboriginal people within Canadian society continue to face discrimination on a number of fronts. According to Article 15 of the UN Declaration on the Rights of Indigenous Peoples, the Government of Canada, provincial and territorial governments, and their human rights institutions, have a positive obligation to work with Aboriginal peoples, to combat discrimination against, and promote tolerance towards, Aboriginal peoples:

> **Article 15**
> 2. States shall take effective measures, in consultation and cooperation with the indigenous peoples concerned, to combat prejudice and eliminate discrimination and to promote tolerance, understanding and good relations among indigenous peoples and all other segments of society.[206]

One concern that we heard repeatedly in the dialogue sessions was the fact that newcomers to Canada can harbour discriminatory views of Aboriginal people. Participants felt strongly that newcomers must be educated about the history of Aboriginal peoples, be able to demonstrate cultural sensitivity towards Aboriginal peoples, and this should be a requirement for entry into Canada.[207]

CAP believes that given the demographic changes that will be occurring in Canada in future decades that will see both an increase in immigrant and Aboriginal populations, it is crucial that new Canadians become educated about the history of Aboriginal peoples in Canada, the discrimination they face, their rights, and the obligations of government towards them.

41. The Commission should undertake a study, in coordination with officials from the Department of Citizenship and Immigration, about policy, legislative and administrative changes that can be undertaken to ensure that newcomers to Canada receive education about the history of Aboriginal Peoples in Canada as a requirement for entry into Canada and Canadian Citizenship. Based on this study,

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205 Based on Recommendation 23 of *Final Report on Needs Assessment*, *supra* note 7, at p. 23.

206 UNDRIP, *supra*, note 47, at Article 15.

207 *Final Report on Needs Assessment*, *ibid.*, p. 9, Aboriginal Affairs Coalition of Saskatchewan , 5th bullet; and p. 10, Manitoba Indigenous Peoples Confederacy, 20th bullet.

the Commission should prepare and submit a special report to Parliament on this basis pursuant to 61(2) of the CHRA.[208]

42. In addition, the Canadian Human Rights Tribunal and provincial and territorial commissions should work with Aboriginal organizations, including CAP and its affiliates, and organizations that represent newcomers to Canada to design seminars and workshops, or other materials, to educate newcomers on the history of Aboriginal peoples.[209]

43. The CHRC and provincial and territorial human rights commissions, should work with Aboriginal organizations, including CAP and its affiliate organizations, to create partnerships with provincial/territorial ministries of education to support education on human rights issues in the school systems.[210]

5. CONCLUSION

In 2008, CAP and its constituents welcomed the Royal Assent of the long overdue repeal of Section 67. We were pleased when the federal government put an end to this discriminatory and unacceptable measure, which had prevented our people from receiving the same degree of human rights protection as all other Canadians.

For more than thirty years, CAP and the CHRC had objected to and called for the repeal of Section of 67. This blanket exception in the *CHRA* had been particularly prejudicial to women who were Bill C-31 Indians and their descendents, by preventing them from launching human rights complaints concerning the residual discrimination they faced from provisions of the *Indian Act*.

In 1999, the Supreme Court of Canada in the *Corbière* decision set out this situation:

> ...band members living off-reserve form part of a "discrete and insular minority", defined by both race and residence, which is vulnerable and has at times not been given equal consideration or respect by the government or by others in Canadian or Aboriginal society. Decision makers have not always considered the perspectives and needs of Aboriginal people living off-reserves...[211]

Twelve years after the *Corbière* decision, many people still do not have the right to vote in band elections. In 2008, CAP and the CHRC undertook a review of the Custom

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208 This recommendation is based on the needs articulated *ibid.* at note 149. For the text of Section 61(2) of the CHRA, see *supra* note 127.

209 This recommendation is based on the needs articulated at note 149.

210 This recommendation is based on the needs articulated at *supra* note 14.

211 *Corbière*, *supra* note 5 at para. 71.

Election Codes and found that many had fundamental flaws either in their substantive or procedural elements.[212] There is a compelling need for band councils to act in conformity with international human rights law, norms and standards. The reality is that the band councils as presently constituted and mandated will struggle with the task because they are not accountable to off-reserve and non-status Indians.

As the discussion in Section 3 of this report attests, there is an obvious and significant need to support and increase awareness of Aboriginal human rights and to address the capacity issues faced by CAP and its affiliates. Meaningful access to human rights protections depends first and foremost on awareness of rights and having the capacity to exercise them. As the number of complaints at the Commission and Tribunal rise, CAP and our affiliates will have the justifiable expectation that we will be meaningfully engaged with INAC, CHRC and other Aboriginal organizations in ensuring that the human rights of all our peoples are being respected and advanced. From a practical perspective, we anticipate that the 44 recommendations set out in this report will receive serious consideration to bring the central questions more sharply into focus. Only when our rights and interests are fully protected and acted upon can we reconcile our relationship to the Crown and truly prepare for the future of the next generations.

While the repeal of Section 67 of the *CHRA* can be considered a step in the right direction to realize the fulfillment of full equality for Aboriginal peoples in Canada, our needs assessment revealed that more research and actions are required before the *CHRA* is able to provide sufficient protection of our human rights. Canada committed, both by words and actions, to a new relationship with Aboriginal peoples; one that involves providing stronger protection to our human rights. Repealing Section 67 was only the start of that commitment; not the entire fulfillment of that commitment.

There is a need for greater human rights awareness and education for Aboriginal people, and both the Canadian Human Rights Commission and provincial and territorial commissions have a large role to play in this, working in conjunction with Aboriginal organizations, including CAP and its affiliates. Commission and Tribunal staff should be representative of the Aboriginal population in Canada and need to possess cultural competency about Aboriginal peoples.

The human rights protections for Aboriginal people within the *CHRA* need to be strengthened in many ways to meet the needs of the diverse cultural identities of Aboriginal peoples. It is CAP's view that the Canadian Human Rights Commission can take the lead by adopting guidelines that clarify a number of interpretive issues under the *CHRA*, including:

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212 See *Justice is Equality: Post-Corbière Report, supra* note 94.

- specifying the numerous Aboriginal identity characteristics that are protected by the *CHRA*;
- specifying that the protected area of "goods and services" includes *Indian Act* or band council election laws, *Indian Act* registration or band council membership laws, and federal funding of services and programs to Aboriginal people;
- specifying how the non-derogation and new interpretive provision should not be interpreted to perpetuate the historic inequalities created by the *Indian Act*; and
- specifying how the exception to the one-year time limit for bringing complaints should be sensitively applied in the case of Aboriginal complainants.

While the Commission can play a large role in using its existing statutory powers to clarify the interpretation of *CHRA* for Aboriginal complainants, it is CAP's view that legislative amendments to the *CHRA* to specifically include "Aboriginal origin", "Aboriginal residency" and "political belief or opinion" within the listed grounds of discrimination should be implemented by Parliament.

Twenty-nine years after the repatriation of the constitution, the recognition and protection of Aboriginal rights and interests remains a daily concern for our constituents. Since the passing of Section 67 in 1977, the *Indian Act* side-stepped human rights scrutiny, causing the expansion of a human rights chill over off-reserve Aboriginal peoples. Today, the *Indian Act* and its regulations remain both directly and indirectly the central source of discrimination for off-reserve Aboriginal peoples and serious inequality issues in the legislation remain to be addressed. These include: Section 6 Persons entitled to be registered; Section 20 Possession of Lands in Reserves; Section 42 Descent of Property; Section 46 Minister may declare Will Void; Section 51 Mentally Incompetent Indians; and Section 74 Elections of Chiefs and band councils. In addition to the *Indian Act*, the complex funding and service delivery regimes flowing from this legislation and Canada's Section 91(24) jurisdiction over "Indians and lands reserved for Indians" will require scrutiny and actions to ensure that they do not constitute a violation of the *CHRA*. Finally, a proactive review of the *Indian Act* with the objective to remove all discriminatory provisions should be conducted. Human rights protection and equality for all Aboriginal peoples was the objective for repealing Section 67 of the *CHRA*. It is CAP's position that given this objective, the federal government should consult and accommodate Aboriginal peoples prior to amending the *Indian Act* and the *CHRA* in any shape or form.

It is our hope that the discussion and 44 recommendations set out in this report are given serious consideration by all the parties who have a role to play in ensuring that the human rights of Aboriginal peoples are respected and promoted, including the Parliament, Indian and Northern Affairs Canada, other federal government departments,

the Canadian Human Rights Commission and Tribunal, and provincial and territorial human rights commissions.

APPENDIX "A" TO THE REPORT OF THE CONGRESS OF ABORIGINAL PEOPLES

CONTEXTUAL FACTORS

For CAP and its constituents, the full impact of the repeal of Section 67 cannot be appreciated without considering a number of contextual factors. Specifically, we review the following social and legal factors that are significant to CAP's constituency:

1. The large and growing urban / off-reserve Aboriginal population;
2. The unique needs and circumstances of the off-reserve Aboriginal population;
3. The *Indian Act's* impact on the off-reserve, status and non-status Indian population;
4. Canada's commitment to a new relationship with Aboriginal peoples following the repeal of Section 67;
5. Canada's endorsement of the United Nation's Declaration on the Rights of Indigenous Peoples; and
6. The Honour of the Crown.

1. The large and growing urban / off-reserve Aboriginal population

According to the 2006 Census, 1,678,235 people reported Aboriginal ancestry.[213]

The steady rise of the Aboriginal population is set out in the following Chart produced by Statistics Canada:[214]

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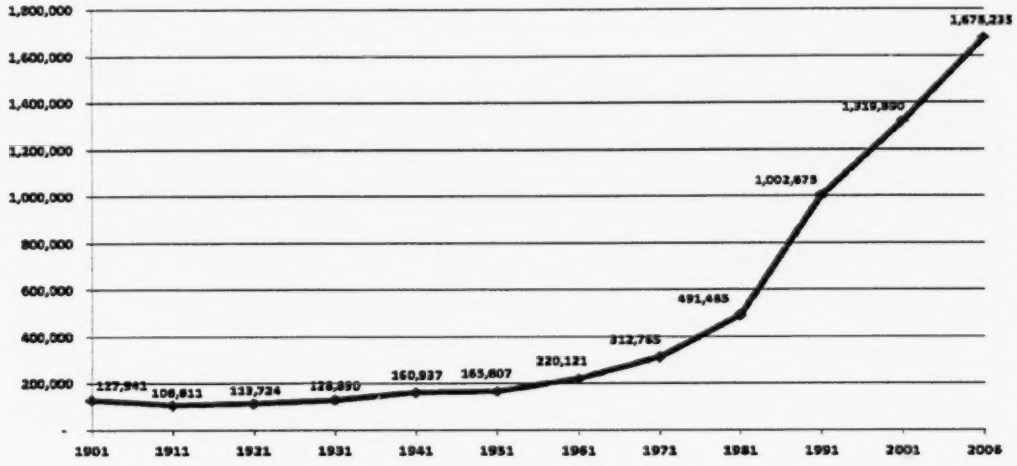
[213] Statistics Canada Chart: "Aboriginal Ancestry (14), Area of Residence (6), Age Groups (8), Sex (3) and Selected Demographic, Cultural, Labour Force, Educational and Income Characteristics (227A), for the Total Population of Canada, Provinces and Territories, 2006 Census - 20% Sample Data", available at: http://www12.statcan.gc.ca/census-recensement/2006/dp-pd/tbt/Rp-eng.cfm?LANG=E&APATH=3&DETAIL=0&DIM=0&FL=A&FREE=0&GC=0&GID=0&GK=0&GRP=1&PID=97445&PRID=0&PTYPE=88971,97154&S=0&SHOWALL=0&SUB=0&Temporal=2006&THEME=73&VID=0&VNAMEE=&VNAMEF.

[214] See http://www12.statcan.ca/english/census01/Products/Analytic/companion/abor/charts/abancestry.cfm.



Fifty-eight years ago, the Census of Canada reported that 6.7% of the Aboriginal population lived in cities. In 2006, the Census reported that over 60% of the ancestry based population now resides in urban areas. The migration of Aboriginal peoples into the urban centres represents the most significant Aboriginal demographic for consideration by policy makers.

According to Statistics Canada, the percentage of Indians per province who live off-reserve was calculated in 2006 to be as follows:[215]

British Columbia	62%	Quebec	49%
Alberta	59%	New Brunswick	44%
Saskatchewan	48%	Nova Scotia	48%
Manitoba	45%	Prince Edward Island	68%
Ontario	70%	Newfoundland and Labrador	82%

These figures are based on Aboriginal Identity statistics. It is clear that these numbers would be even higher, if based on Aboriginal Ancestry statistics, as illustrated by this Chart produced by Statistics Canada:[216]

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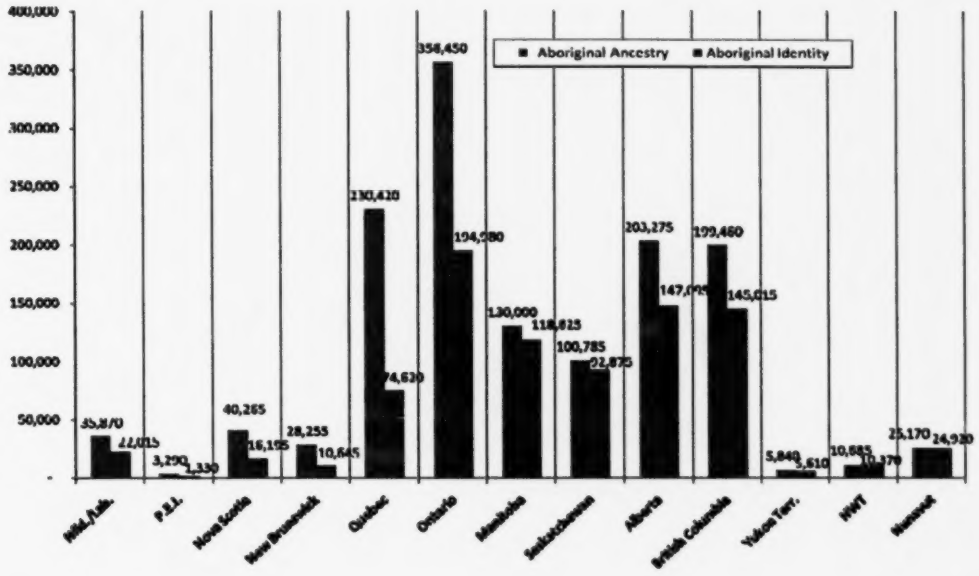
215 Statistics Canada, "2006 Census: Aboriginal Peoples in Canada in 2006: Inuit, Métis and First Nations, 2006 Census – An increasingly urban population", available at http://www12statcan.ca/census-recensement/2006/as-sa/97-558/p3-3ng.cfm.

216 Source: Statistics Canada, Population by Age, by Aboriginal Identity, by area of residence for Canada Provinces and Territories and Federal Electoral Districts, for 2006 Census (20% sample data) and Statistics Canada, Selected Cultural Characteristics (47), Aboriginal



2. The unique needs and circumstances of the off-reserve Aboriginal population

The above census data clearly demonstrates that there is a substantial off-reserve Indian population in Canada. While the off-reserve Indian population share many of the same experiences of discrimination as the on-reserve population; they have also experienced discrimination unique to their "off-reserve" status, which makes them an especially vulnerable group.

This social reality was recognized by the Supreme Court of Canada in the landmark *Corbière v. Canada (Minister of Indian and Northern Affairs)* case.[217] In that case, the Court recognized that off-reserve Indians are the object of discrimination and constitute an under-privileged group.[218] The Court also accepted that many off-reserve band members were expelled from reserves because of policies and legal provisions which were changed by Bill C-31 and can be said to have suffered double discrimination.[219]

Identity-Based Designation (8), Registered Indian Status (3), Age Groups (17), Sex (3) and Area of Residence (7) for the Total Population of Canada, Provinces and Territories, 2006 Census.

217 *Corbière v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203 ("*Corbière*").

218 *Ibid.*, at para. 19.

219 *Ibid.*

The reasons of Justice L'Heureux-Dubé, in particular, speak in detail about the unique experience of discrimination faced by the off-reserve population:

> [B]and members living off-reserve form part of a "discrete and insular minority", defined both by race and residence, which is vulnerable and has at times not been given equal consideration or respect by the government or by others in Canadian or Aboriginal society. Decision makers have not always considered the perspective and needs of Aboriginal people living off reserves, particularly their Aboriginal identity and their desire for connection to their heritage and cultural roots. As noted by the Royal Commission on Aboriginal Peoples,
>
> > [b]efore the Commission began its work, however, little attention had been given to identifying and meeting the needs, interests and aspirations of urban Aboriginal people. Little thought had been given to improving their circumstances, even though their lives were often desperate, and relations between Aboriginal people and the remainder of the urban population were fragile, if not hostile.
> >
> > The information and policy vacuum can be traced at least in part to long-standing ideas in non-Aboriginal culture about where Aboriginal people 'belong'. (*Report of the Royal Commission on Aboriginal Peoples* (1996), vol. 4, *Perspectives and Realities*, at p. 519.)
>
> Similarly, there exist general stereotypes in society relating to off-reserve band members. Peoples have often been only seen as "truly Aboriginal" if they live on reserve. The Royal Commission wrote:
>
> > Many Canadians think of Aboriginal people as living on reserves or at least in rural areas. This perception is deeply rooted and persistently reinforced. . . .
> >
> > > . . . There is a history in Canada of putting Aboriginal people 'in their place' on reserves and in rural communities. Aboriginal cultures and mores have been perceived as incompatible with the demands of industrialized urban society. This leads all too easily to the assumption that Aboriginal people living in urban areas must deny their culture and heritage in order to succeed -- that they must assimilate into this other world. The corollary is that once Aboriginal people migrate to urban areas, their identity as Aboriginal people becomes irrelevant.
> >
> > (*Perspectives and Realities, supra*, at p. 519.)
>
> ... [O]ff-reserve band members experience particular disadvantages compared to those living on-reserve because of their separation from the reserve. They are apart from communities to which many feel connection, and have experienced racism, culture

shock, and difficulty maintaining their identity in particular and serious ways because of this fact.[220]

3. The *Indian Act's* impact on the off-reserve, status and non-status Indian population

As noted by Justice L'Heureux-Dubé in *Corbière*:

> ... [T]he creation of the group of off-reserve Aboriginal people can be seen as a consequence, in part, of historic policies toward Aboriginal peoples. The *Royal Commission on Aboriginal Peoples* describes the relationship between the federal government and Aboriginal peoples during the period from the early 1800s to 1969 as one of "displacement and assimilation" (*Report of the Royal Commission on Aboriginal Peoples*, vol. 1, *Looking Forward, Looking Back*, at pp. 137-91).[221] [emphasis added]

Indeed, one of the more damaging ways Canada sought to displace and assimilate Aboriginal people during this period was through controlling Aboriginal identity, or more precisely, who was entitled to be registered as an "Indian" under the *Indian Act*. From 1868 to 1985, this objective was accomplished in a number of ways:

1. From 1869 to 1985, restricting the passing of Indian status through male line only. The following is an example of how this restriction was worded at one time:

> "Any Indian woman who marries any person other than an Indian ... shall cease to be an Indian in every respect within the meaning of this Act..."[222]

As a consequence of such rules, the children of these women were also not entitled to Indian status. Indian men who married non-Indian woman did not lose their status. Their wives and children instead gained Indian status.

2. From 1876 to 1985, illegitimate children of Indian women could lose status "if the Registrar [was] satisfied that the father of the child was not an Indian...".[223]

3. From 1869 to 1985, Indian men and non-married Indian women could voluntarily choose renounce their Indian status, provided a board of examiners found they possessed sufficiently "good character" to apply to be declared Canadian citizens.[224]

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220 *Ibid.*, at paras. 71-72.

221 *Ibid.*, at para. 81.

222 *Indian Act*, S.C. 1876, c. 18, s.3(d).

223 See, for example, *Indian Act*, S.C. 1876, c. 18, s.3(a), and *Indian Act*, S.C. 1951. c. 29, s.11(c).

224 See, for example, *Indian Act*, R.S.C. 1906, c. 81, s.108.

4. From 1869 to 1951, Indians would automatically lose their Indian status upon obtaining a university degree, becoming a doctor or a lawyer, joining the holy orders, or travelling outside Canada for over 5 years without the express permission of the Minister of Indian Affairs. This last rule had an impact on status Indian men who enlisted in Canada's military and fought in major wars.[225]

5. From 1951 to 1985, Indians whose mother and maternal grandmother had only gained status through marriage, automatically lost status upon reaching age of 21 if born on or after 1951.[226] This is the so-called "Double Mother Rule".

The impact of an Indian person losing Indian status during this period affected not only the person's right to tangible benefits, but, more importantly, their right to live in their home communities. This was noted by Madam Justice Ross, in *McIvor v. The Registrar, Indian and Northern Affairs Canada*:

> Prior to the 1985 amendments to the *Indian Act*, registration as an Indian was associated with a number of consequences both tangible and intangible. Registration as an Indian was linked in all but a few cases to band membership, to entitlement to live on a reserve, and to the benefits provided by the federal government to persons registered as Indian. The tangible benefits included the benefit of expenditures of Indian moneys, the use and benefit of lands in a reserve, the possession of reserve land allotted to the Indian by the band council, and the exemption from taxation of the interest of the Indian in reserve lands and personal property situated on a reserve.
>
> Persons who were registered as Indians were entitled to other benefits including eligibility for federally funded programs and assistance, such as non-insured health benefits and post-secondary education funding.
>
> When a woman who was registered as an Indian married a non-Indian and lost her status, she was forced to leave her home and her reserve. She was required to divest herself of any property she owned on the reserve and was precluded from inheriting reserve lands. She could not pass her status on to her children and so her children could not be registered as Indians. Even if she subsequently divorced, she could not return to the reserve or even be buried on the reserve: see Royal Commission Report at c. 2, pp. 21-23.[227] [emphasis added]

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225 See, for example, *Indian Act*, R.S.C. 1906, c. 81, s.111 and *Indian Act*, S.C. 1876, c. 18, s.3(b). For further information, see *Royal Commission Report on Aboriginal Peoples* (1996), Vol. 1, "Looking Forward Looking Back", Part Two, "False Assumptions and a Failed Relationship", Chapter 12, "Veterans", available at http://www.collectionscanada.gc.ca/webarchives/20071124130133/http://www.ainc-inac.gc.ca/ch/rcap/sg/sgm12_e.html.

226 See *Indian Act*, S.C. 1951, c. 29, s.12(1)(a)(iv).

227 *McIvor* BCSC, *supra* note 9, at paras. 123-125.

Thus, a clear impact of the discriminatory Indian registration rules passed by the federal government was "the denial of status and the severing of connections between band members and the band".[228] Consequently, the off-reserve population was born.[229]

While the *Indian Act* was amended in 1985 (through what is known as Bill C-31) as a means of redressing the historic discrimination in the *Indian Act*, it did not do so entirely, and in fact created new forms of discrimination.[230]

First, Bill C-31 eliminated the previous status rules and replaced them with two categories of status: Section 6(1) status and Section 6(2) status. In effect, Section 6(2) was a way for the government to assign "half" status to children who had only one status Indian parent. This created many difficulties in the way that status was assigned and essentially replaced the Double Mother Rule with what is known as the "Second Generation Cut-Off Rule".[231] In essence, the Second Generation Cut-Off Rule operates to cut off Indian status eligibility after two successive generations of mixed parenting (i.e. between a status Indian and non-Aboriginal person or an Aboriginal without Indian status). Those individuals who hold Section 6(2) status cannot pass Indian status to their children unless they parent with another status Indian. As a result of high rates of mixed parenting in some Aboriginal communities, it has been projected that within 3 generations (75 years), nearly 1 in every 3 individuals who descend from the current Indian status population is expected to lack entitlement to Indian status and band membership.[232]

While gender neutral, the Second Generation Cut-Off Rule is arguably discriminatory on the basis of race or ethnic origin as it operates akin to a blood quantum requirement, without reference to any other aspects of Aboriginal identity.[233]

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228 *Corbière supra*, note 38, at para. 83 (per L'Heureux-Dubé).

229 While the creation of the off-reserve population is largely attributable to the discriminatory status provisions in the *Indian Act*, today there are several reasons explaining the large off-reserve population. As noted by McLachlin and Bastarache JJ. in *Corbière, ibid.*, at para. 19: "The off-reserve population comprises persons who have chosen to live off-reserve freely, persons who have been forced to leave the reserve reluctantly because of economic and social considerations, persons who have at some point been expelled then restored to band membership through Bill C-31 [citation omitted], and descendents of these people."

230 Bill C-31, *An Act to Amend the Indian Act*, now S.C. 1985, c.27.

231 S. Grammond, "Discrimination in the Rules of Indian Status and the McIvor Case" (2009) 35:1 Queen's L.J. 421.

232 See S. Clatworthy, *Indian Registration, Membership and Population Change in First Nations Communities*, February 2005, pp. 30-31.

233 Grammond, *supra* note 52.

Second, Bill C-31 failed to end gender discrimination in the *Indian Act* because, although it removed explicit distinctions based on sex and marriage, its effect was to subject the children of Bill C-31 women to the Second Generation Cut-Off Rule one generation sooner than the children of status Indian men who had "married out" and passed Indian status on to their children. Under the doctrine of "acquired rights", these children were assigned "full" Section 6(1) status and able to pass on status no matter who they parented with, whereas the children of Bill C-31 women got assigned "half" Section 6(2) status and are only able to pass on status if they parent with another status Indian. As a result, individuals from the same generation and with similar parenting (having only one Aboriginal status Indian parent) were provided different status rights under Bill C-31, depending on whether or not their Indian status was derived from their mother or father.

This discrimination was challenged in the *McIvor* case.[234] The challenge culminated with a finding by the British Columbia Court of Appeal that Sections 6(1)(a) and 6(1)(c) of the *Indian Act* registration provisions violated Section 15(1) of the *Charter*. The Court ordered a declaration of invalidity but it stayed for 1 year in order to provide Canada the opportunity to amend the *Indian Act*. On March 11, 2010, Canada introduced Bill C-3, the *Gender Equity in Indian Registration Act* for first reading in House of Commons. Although Bill C-3 was subject to a number of criticisms,[235] including failing to go far enough in addressing the residual sex discrimination, it was passed by House of Commons on November 22, 2010, the Senate on December 9, 2010, and received Royal Assent on December 15, 2010.[236] The anticipated result of Bill C-3 is that approximately 45,000 people will now be entitled to Indian Status.[237]

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234 *McIvor v. Canada (Registrar of Indian and Northern Affairs)*, [2007] 3 C.N.L.R. 72 (BCSC), rev'd [2009] 2 C.N.L.R. 236 (BCCA), leave to appeal refused [2009] S.C.C.A. No. 234.

235 A specific source of criticism for Bill C-3 is its ineffective solution to the issue of gender discrimination found in provisions governing Indian status. As the Union of B.C. Chiefs and other organizations have asserted, Bill C-3 fails to uphold equality for the grandchildren of Bill C-31 women who were born before September 4, 1951, introducing age distinctions in addition to residual sex discrimination. Grandchildren who trace their Aboriginal descent through the maternal line will continue to be denied status if they were born prior to September 4, 1951. And yet grandchildren who trace their Aboriginal descent through the male line will not. The Bill also applies confusing restrictions on the children of Bill C-31 women born after 1985. It also does not address the problematic Second Generation Cut-Off Rule and continues to perpetuate situations within families where some members are s. 6(1) full status, some are s. 6(2) half status, and other members are non-status Indians. For more information see Equality Rights Now website: http://www.equalityrightscentral.com/canada_equality_rights_law.php?page=legislative_reform&subtopic=Updates&id=20110302102757&doc=Bill_C-3_Paper_%28final%29mar2.htm#_ftnref20.

236 *Gender Equity in Indian Registration Act*, R.S.C 2010 c. I-5 ("Bill C-3").

237 S. Clatworthy, *Reassessing the Population Impacts of Bill C-31* (2001), Minister of Indian Affairs and Northern Development, Ottawa, 2004, p. ix.

Finally, at the time Bill C-31 was passed, permitting the reinstatement of over 100,000 persons to Indian status, many *Indian Act* bands became concerned about the impact this would have on their lands and resources (in some cases insufficient to even meet existing needs) and complained publicly. Canada's response was not to provide additional lands or moneys (Canada has similarly not provided any additional lands or money in response to the new Bill C-3), but to amend the *Indian Act* to allow *Indian Act* bands the ability to adopt memberships codes in which they could choose to restrict membership to some of those people being reinstated. While Canada touted the new membership rules as giving some (limited) powers of self-government to *Indian Act* bands, in reality, it was passing off to bands – some of whom felt they had no choice – the ability to discriminate.[238] Such codes will be subject to challenge once Section 67 is fully repealed. *Indian Act* band councils with such membership codes should be encouraged, and provided with sufficient resources by Canada, to proactively review their membership codes and bring them in line with the *CHRA*. As well, off-reserve Aboriginal people and their representative organizations need resources to educate and advocate for changes to custom codes.

This last effect of Bill C-31 illustrates the discrimination that can arise within Aboriginal communities as a result of government underfunding, especially when legislative amendments lead to increases in the status Indian population. Government has an obligation to ensure such discrimination does not arise in the future. It is imperative that in light of the new Bill C-3 that Canada ensure bands have sufficient resources to receive and service their new members.

The *Indian Act* has and continues to impact the lives of the off-reserve, status and non-status Indians. The repeal of Section 67 does not simply impact the on-reserve population. Although not living on reserve, off-reserve individuals are very much affected by decisions of *Indian Act* band councils and the Government of Canada / Indian and Northern Affairs Canada, including decisions with respect to registration and membership, voting rights, and eligibility for various programs and services.

4. Canada's commitment to a new relationship with Aboriginal peoples following the repeal of Section 67

When the repeal of Section 67 was announced on June 18, 2008, the Government of Canada described the repeal as a significant achievement. The Department of Indian and Northern Affairs issued a press release where credit was attributed to the federal government for ending the "legislative gap that has left many individuals ... without full

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238 Approximately, 90 *Indian Act* bands adopted membership codes that exclude the s. 6(2) of Bill C-31 Indians. See S. Clatworthy, *Indian Registration, Membership and Population Change in First Nations Communities*, *supra* note 53, at p. 6.

access to the Act." In the press release, then Minister of Indian Affairs, Chuck Strahl made the following statement:

> Passage of Bill C-21, An Act to amend the *Human Rights Act* marks a significant turning point in the relationship between First Nations and the Government of Canada. It underscores this government's strong commitment to protecting the human rights of all Canadians.[239] [emphasis added]

5. Canada's endorsement of the United Nations' Declaration on the Rights of Indigenous Peoples

On November 12, 2010, the Government of Canada formally endorsed the United Nations Declaration on the Rights of Indigenous Peoples. The Declaration contains 46 articles that broadly address Indigenous peoples' rights and governments' obligations with respect to land, resources, self-government, consultation, economic rights, culture, language, non-discrimination, and other topics.[240] Article 43 of the Declaration provides that "The rights recognized herein constitute the minimum standards for the survival, dignity and well-being of the indigenous peoples of the world."

In a press release announcing the endorsement, Minister of Indian Affairs, John Duncan, made the following statements:

> "We understand and respect the importance of this United Nations Declaration to Indigenous peoples in Canada and worldwide."
>
> "Canada has endorsed the Declaration to further reconcile and strengthen our relationship with Aboriginal peoples in Canada."
>
> "Canada's Aboriginal leadership has spoken with passion on the importance of endorsing the Declaration. Today's announcement represents another important milestone on the road to respect and co-operation."[241]

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239 Indian and Northern Affairs Press Release, "Minister Strahl Announces that Royal Assent Given to legislation Extending Human Rights Protections to all First Nations", Ottawa (June 18, 2008), 2-3057. Accessible at http://www.ainc-inac.gc.ca/ai/mr/nr/m-a2008/2-3057-eng.asp?p1=209557&p2=399086 (last accessed 2/22/2011).

240 *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res. 61/295, UN GAOR, 2007. The full text of the Declaration is available at: http://www.un.org/esa/socdev/unpfii/en/drip.html.

241 Indian and Northern Affairs Canada, "Canada Endorses the United Nations Declaration on the Rights of Indigenous Peoples", Ottawa, Ontario, November 12, 2010, Ref. #2-3429, available at http://www.ainc-inac.gc.ca/ai/mr/nr/s-d2010/23429-eng.asp (last accessed 2/22/2011).

The right of Indigenous peoples to equality and non-discrimination in both the exercise of their individual and collective rights is a recurring and prominent principle that comes out of several provisions of the Declaration, including in its first two articles:

> **Article 1**
> Indigenous peoples have the right to the full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms as recognized in the Charter of the United Nations, the Universal Declaration of Human Rights(4) and international human rights law.
>
> **Article 2**
> Indigenous peoples and individuals are free and equal to all other peoples and individuals and have the right to be free from any kind of discrimination, in the exercise of their rights, in particular that based on their indigenous origin or identity.

In its final article:

> **Article 46**
> ...
> 2. In the exercise of the rights enunciated in the present Declaration, human rights and fundamental freedoms of all shall be respected. The exercise of the rights set forth in this Declaration shall be subject only to such limitations as are determined by law and in accordance with international human rights obligations. Any such limitations shall be non-discriminatory and strictly necessary solely for the purpose of securing due recognition and respect for the rights and freedoms of others and for meeting the just and most compelling requirements of a democratic society.
>
> 3. The provisions set forth in this Declaration shall be interpreted in accordance with the principles of justice, democracy, respect for human rights, equality, non-discrimination, good governance and good faith.

6. The Honour of the Crown

The Honour of the Crown is an ethical standard long imposed by the Canadian common-law to set limits—and in some cases impose obligations—on government actors in their dealings with Aboriginal Peoples.[242] As was noted by the Supreme Court of Canada in the recent decision of *Beckman v. Little Salmon/Carmacks First Nation*:

> The obligation of honourable dealing was recognized from the outset by the Crown itself in the Royal Proclamation of 1763 (reproduced in R.S.C. 1985, App. II, No. 1), in which the British Crown pledged its honour to the protection of Aboriginal peoples from

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[242] See *Wewaykum Indian Band v. Canada*, 2002 SCC 79, [2002] 4 S.C.R. 245 at para. 80; *R. v. Taylor and Williams* (1981), 34 O.R. (2d) 360.

> exploitation by non-Aboriginal peoples. The honour of the Crown has since become an important anchor in this area of the law: see *R. v. Taylor* , (1981), 62 C.C.C. (2d) 227, (Ont. C.A.), leave to appeal refused, [1981] 2 S.C.R. xi; *R. v. Sparrow*, 1990 CanLII 104 (S.C.C.), [1990] 1 S.C.R. 1075; *R. v. Nikal*, 1996 CanLII 245 (S.C.C.), [1996] 1 S.C.R. 1013; *Delgamuukw v. British Columbia*, 1997 CanLII 302 (S.C.C.), [1997] 3 S.C.R. 1010; as well as *Badger*, *Marshall*, and *Mikisew Cree*, previously referred to. The honour of the Crown has thus been confirmed in its status as a constitutional principle.[243]

In a recent line of cases involving the Crown's duty to consult and accommodate with Aboriginal peoples, the Supreme Court of Canada has repeatedly maintained that in all its dealings with Aboriginal peoples, the Crown must act honourably.[244] The ethical duty expected of the Crown was restated in the *Taku River* case as follows:

> [T]he principle of the honour of the Crown grounds the Crown's duty to consult and if indicated accommodate Aboriginal peoples, even prior to proof of asserted Aboriginal rights and title. The duty of honour derives from the Crown's assertion of sovereignty in the face of prior Aboriginal occupation. It has been enshrined in s. 35(1) of the *Constitution Act, 1982*, which recognizes and affirms existing Aboriginal rights and titles. Section 35(1) has, as one of its purposes, negotiation of just settlement of Aboriginal claims. In all its dealings with Aboriginal peoples, the Crown must act honourably, in accordance with its historical and future relationship with the Aboriginal peoples in question. The Crown's honour cannot be interpreted narrowly or technically, but must be given full effect in order to promote the process of reconciliation mandated by s. 35(1).[245]

It is CAP's view that the Supreme Court's instructions that the duty of the Crown to act honourably should not be interpreted narrowly or technically means that the duty not only prevents the Crown from acting in certain ways to Aboriginal people, but also requires the Crown to take positive action on behalf of Aboriginal people where circumstances require.

In addition, it is clear from Supreme Court of Canada cases that the Honour of the Crown is a fundamental concept to the ultimate goal of reconciling the relationship between Canada and Aboriginal peoples. As noted by McLachlin C.J. in *Haida Nation v. British Columbia (Minister of Forests)*:

> The historical roots of the principle of the honour of the Crown suggest that it must be understood generously in order to reflect the underlying realities from which it stems. In all its dealings with Aboriginal peoples, from the assertion of sovereignty to the resolution of claims and the implementation of treaties, the Crown must act honourably. Nothing

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243 *Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53 at para. 42.

244 *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, at para. 17.

245 *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74, at para. 24.

> less is required if we are to achieve "the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown": Delgamuukw, supra, at para. 186, quoting Van der Peet, supra, at para. 31. [emphasis added][246]

It is CAP's firm position that the ethical standard of the Honour of the Crown binds the Government of Canada, its officials and employees. Without the Crown acting honourably with regard to Aboriginal peoples, there can be no reconciliation between Canada and Aboriginal peoples.

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246 *Haida Nation v. British Columbia (Minister of Forests)*, *supra*, note 65 at para. 17.

APPENDIX "B" TO THE REPORT OF THE CONGRESS OF ABORIGINAL PEOPLES

THE CONGRESS OF ABORIGINAL PEOPLES

The Congress of Aboriginal Peoples ("CAP") is the national body that represents the interests of and advocates for the rights of off-reserve non-status and status Indians, and Métis peoples living in urban, rural, remote areas throughout Canada. CAP was founded in 1971 as the Native Council of Canada to address the lack of recognition of Aboriginal peoples and to challenge the division and exclusion of off-reserve Aboriginal peoples, from federal responsibility. For forty years, CAP has advocated on behalf of off-reserve Aboriginal peoples in key areas of self-government, including self-determination, Aboriginal and treaty rights, land claims, health and social programs, economic development, capacity building, research, and legal/political recognition.

Provincial Affiliates

CAP's affiliates are provincially or territorially incorporated organizations (PTOs) that have legally associated with CAP at various times since 1971. Each affiliate has its own constitution and is separately funded. Individuals may join his or her respective PTO if they meet the membership criteria. The policy goals and objectives of CAP are developed by the PTO's at CAP's annual general assembly. The Presidents and/or Chiefs of the PTO's belong to the Board of Directors for CAP, which meets quarterly to oversee the implementation of the policy objectives set by the annual general assembly. CAP's affiliates are:

Aboriginal Affairs Coalition of Saskatchewan - Saskatoon, SK - 306-975-0012	**New Brunswick Aboriginal Peoples Council** - Fredericton, NB - 506-458-8422 www.nbapc.org
Federation of Newfoundland Indians - Cornerbrook, NL - 709-634-7763 www.fni.nf.ca	**Indigenous Peoples Confederacy** - Dauphin, MB - 204-638-8308
Labrador Métis Nation - Happy Valley – Goose Bay, NL - 709-896-0592 www.labradormetis.ca	**Ontario Coaltion of Aboriginal People** - Wabigoon, ON - 807-938-1321 www.o-cap.ca
Native Alliance of Quebec / Alliance Autochtone du Québec - Gatineau, QC - 819-770-7763 www.aaqnaq.com	**United Native Nations Society of British Columbia** - North Vancouver, BC - 604-688-1821 www.unns.bc.ca
Native Council of Nova Scotia - Truro, NS - 902-895-1523 www.ncns.ca	**CAP National Youth Council** - Ottawa, ON - 613-747-6022
Native Council of Prince Edward Island - Charlottetown, PEI - 902-892-5314 www.ncpei.com	

CAP's Accomplishments

CAP has participated in many significant cultural, legal and political initiatives during the last forty years on behalf of its off-reserve status Indians, non-status Indians and Métis constituents. As a result of CAP's participation in the constitutional talks regarding the repatriation of the Constitution in the 1980's, the *Constitution Act, 1982* was realized.[247] Section 35 recognizes that the Aboriginal peoples of Canada includes the Indian, Inuit and Métis and protects their Aboriginal and Treaty rights.[248] CAP ensured that the views of its constituents were heard prior to the implementation of the Bill C-31 amendments to the *Indian Act* regarding the process for determining who is an Indian. CAP participated in the Aboriginal roundtable discussions leading up to the *Kelowna Accord* in 2005. CAP has also intervened in significant legal cases, including *McIvor v. Canada*, to ensure that the particular issues related to CAP's constituents are included in the larger legal discussion.[249] CAP has also commenced litigation (*Daniels v. Canada*) seeking a judicial declaration that the federal government has a fiduciary responsibility for Métis and non-status Indians under Section 91(24). Since 2010, CAP has been participating in the Aboriginal Affairs Working Group established by the Council of the Federation. The goal of this work is to develop recommendations and identify actions and strategies to improve the quality of life for all Aboriginal peoples in Canada.

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247 *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11, s.35 (Section 35).

248 *Ibid.*

249 *McIvor v. Canada (Registrar of Indian and Northern Affairs)*, [2007] 3 C.N.L.R. 72 (BCSC), rev'd [2009] 2 C.N.L.R. 236 (BCCA), leave to appeal refused [2009] S.C.C.A. No. 234.